

Governance, Institutions and the Human Condition

Editors

Elizabeth W. Gachenga

Luis G. Franceschi

Migai Aketch

David W. Lutz



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DEDICATION

To the late HWO Okoth Ogendo. A great scholar and fondly remembered teacher.

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We would also like to thank all those who participated in the Conference as well as those who helped in the production, editing and publishing of this book. Last but not least, our thanks go to LawAfrica Publishing Limited, whose support for the Strathmore Ethics Conferences over the years has been immense.

IN MEMORY OF

Professor H W O Okoth-Ogendo

Professor Okoth-Ogendo was born on 1 July 1944 at Kwakungu Village, Gem Rae, Nyakach. He was the second born in a family of nine children. He started his education at Rae Primary School, then Masogo Intermediate School and was admitted to Maseno School.

Young Okoth-Ogendo joined Maseno High School as a form one student in 1961. Some of the senior students then remember him as an over-confident new boy who insisted on participating in school debates which tended to be dominated by senior boys in the upper forms. He also liked reciting poetry and even writing his own. He soon distinguished himself as a member of the school's English Literary Club and eventually one of the editors of MASOP: a handwritten English newsletter-cum-journal. From Maseno he proceeded to Alliance High School where he was in class with other outstanding young Kenyans. Okoth was exceptional and soon became a member of the school's philosophical and theological clubs.

At University College, Dar es Salaam, then a branch of the University of East Africa, Okoth launched his life-long quest to become not merely a lawyer, but an accomplished legal scholar. Many evenings, just before and during the annual examinations, some law students, mainly Kenyans, would gather in the Common Room within his hall of residence, to revise for the examinations, discuss various legal concepts and review some critical cases. Okoth was always central to these discussions and often dominated the debates. He was soon playfully referred to as "the guru". The nickname stuck and will forever remain his identity.

A year before his graduation Okoth published an essay on the implications of land tenure on agricultural development in Kenya and Tanzania – the two contrasting ideological regimes in our own region at that time. And he never turned his back on these themes.

Okoth earned three university degrees: LLB (University of East Africa); BCL Oxford and SJD Yale. On completing formal university education Okoth focused sharply on a life of scholarship with two principal subjects that he had clearly identified while in Dar es Salaam. These were constitutional law and constitutionalism on the one hand, and on the other, land use and agrarian law.

The first call of scholarship was teaching on these subjects, his first base being the University of Nairobi where he spent about forty years. After twenty one years he was appointed a full Professor of Public Law. Not surprisingly, Professor Okoth-Ogendo has been the cornerstone of that School where he was Dean for a record ten years and Chairman of Department of Public Law for eight years. He taught diverse courses including constitutional law, land law, property rights and law, jurisprudence and legal theory, democracy and legal process, agrarian policy and law and environmental law. He supervised numerous students in these subjects.

As one can easily guess, this array of courses offered him an opportunity to touch the lives of most people in the legal profession in Kenya today. But his reputation is actually global for he held a Visiting Professorship and gave specialized lectures at many universities notably Dar es Salaam, Zambia, Zimbabwe, Swaziland, Paris I (Sorbonne), Oxford, Yale, Harvard, Boston, New York University, Florida (Gainsville), Iowa, Clark, Pennsylvania, and Wisconsin (at Madison).

Professor Okoth Ogendo died as he lived, working, while attending a conference in Addis Ababa on 24 April 2009. He is survived by his wife, Ruth Okoth-Ogendo and five children, Niki, Tshazi, Rodney, Wilfred Junior and Ann-Marie Okoth-Ogendo.

**PROFESSOR CHARLES OKIDI, BA (ALASKA METHODIST), MA MALD. PhD
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INTRODUCTION

Luis G Franceschi

The Twentieth Century will go down in history as the bloodiest and cruellest of all. In the Twentieth Century alone more people died through war than in the preceding nineteen centuries together. It is a Century that saw the most inhuman tyrannies come into being: Hitler, Stalin and Lenin; Mussolini, Tito, Ceausescu, Castro, Idi Amin, and Chairman Mao. Something clearly went wrong. Humanity seemed to have departed from the right path. This was despite the fact that the world reached in this very century, a stage of material and technological development that none of our ancestors could ever have imagined. It was a century of paradoxes.

Humanity left the right path when it began to depart from truth; truth about self, about the human person and about the world. Humanity lost direction when it succumbed to the relativistic views of reality. Once the human race lacked a firm understanding of the truth about the human person; about who we are, the foundation of our dignity became disposable and thus human rights ceased to be inalienable. Not only had we lost the way to our destination we had lost the address.

In the attempts to reassert the inalienability of human rights, the concepts of freedom and democracy were advocated. The birth of these concepts, in a century in which relativism ruled, meant that the concepts could not claim a univocal significance. There was no reference for determining the true meaning of the concepts. This explains the reason for the failure of institutions of governance built on these concepts to remedy the situation of abuse of human rights.

Relativism allowed man the possibility of defining a concept according to his/her notion of reality and even of 'absolutizing' their definition. This seems to have occurred with the concept of freedom. Freedom, advocated as the foundation of human rights and of modern day institutions, is understood as an absolute concept. In reality, freedom ought to be understood within a context and with limitations; it is far from being an absolute concept. It is built upon objective elements presupposed by nature. When freedom attempts to oppose nature it turns into a self-destructive weapon, and eventually into a weapon of mass destruction.

Freedom is necessary for democracy, but freedom is not democracy. Democracy presupposes freedom, which we insist presupposes nature. This means that in a true democratic society not everything is subjected to majority rule. Certain realities for example the laws of nature and the natural law precede freedom and so are not subject to majority rule. For instance, in a democratic

process we do not vote whether we want to obey the law of gravity or not. We presuppose it. We do not vote to determine whether Mombasa exists, as Mombasa's existence does not depend on our vote or agreement. We may vote as to whether we want to go to Mombasa or not. Democracy is thus a system that works with energy it does not produce. This energy is the law inherent in nature that sustains human life and that makes us more human.

Democracy like freedom is not an absolute good. It is in fact a daring experiment: The supposition that the will of the majority can legitimately regulate human affairs within a definite framework.[1] The limits to this framework are dictated just as in the case of freedom, by the laws inherent in nature.

Attempts to build institutions and to govern on the basis of misconceptions of freedom and democracy are bound to fail. This -in part- is the reason for the drama we are witnessing in this country today. The will of the majority which claims to be absolute seems to confront the freedom of the individual which also claims to be absolute. The freedom of a Kikuyu to live peacefully in burnt forest among the Kalenjin or of a Kalenjin to purchase property among the Kikuyu in central province is challenged by the will of the majority as evidenced in the post election ethnic intolerance. The result is failed institutions and challenges to governance, which ultimately adversely affect the lives of individuals.

To resolve problems of governance and to resuscitate failed institutions we must go back to the principles underlying human nature. This requires reflection. In an effort to encourage this process of reflection, Strathmore University organised the 5th Annual Ethics Conference on Governance, Institutions and the Human Condition. Fifteen research papers were presented in four sessions, corresponding to the four main areas around which the crisis that almost tore Kenya apart in January-February 2008 seemed to revolve: Constitutional Law, Institutions, Education and the Land Issue.

In his opening address, Yash Pal Ghai explains the impact and role of constitutions and describes the difficulties of viewing the constitution as a mere instrument of change, especially in the African context. Professor Ghai expounds the specific difficulties Kenya faced in its efforts to come up with a new constitution. The Constitution of Kenya Review Commission made great efforts to develop a set of norms that would be the product of a highly consultative and participatory and all- inclusive process. This gave way to the Bomas Conference.

According to Ghai, the lack of political will in the process degenerated into a partisan and political power struggle, where the constitution was no longer at the

centre stage. Political sabotage of the Bomas process hindered the establishment of a Constitutional order and a constitutional state. This has led the country into institutional uncertainty and weakness. The failure at Bomas has meant a failure to address past injustices, to build up both a political community and a democratic state, a partisan judiciary, a state of impunity, disregard for the rule of law and institutional mistrust of key bodies that were created to safeguard the democratic process such as the Electoral Commission.

This lack of high level commitment to the spirit and letter of the constitution implies, according to Ghai, that most politicians are not committed to the public good as evidenced in their subversion of popular will well expressed at Bomas. For many politicians the state is a tool for accumulation of resources which is, as Professor Ghai explains, in direct violation of the constitutional order. He explains that “this process of accumulation cannot easily be secured within the parameters of a democratic constitution with mechanisms and procedures for accountability. Indeed the point that emerges with sharp and sad clarity is that it is only by constant and systemic violations of the constitution and the law that this political class is able to accumulate and establish its control over society-and its opponents”.

Ghai emphasizes that “the enormous disparities that exist between the rich and the poor, the privileged and the disadvantaged, are not the natural order of things. They are man made, by the plunder of state and communal resources, and by policies that favour particular groups and classes”.

Ghai asks himself whether or not we really need a constitution and he explains that establishment of a constitutional order has to do with a “fundamental commitment to the norms and procedures of the constitution. It has more to do with behaviour, practice, and internalization of norms than the constitutional text. A central feature is the impersonalization of power.”

Ghai emphasizes that establishing the constitutional order must be an initiative of the people. Certainly, the political elite have their own vested interests and those interests do not seem to move according to the common good. A genuine process will make use of the civil society and activist groups. The Bomas Draft, Ghai says, had many allowances to enable the public, especially through civil society initiatives, to establish a legal culture where justice would be availed to the disadvantaged and voiceless, thus ending or reducing impunity.

From an international perspective, Richard Wilkins draws on the experience of the United States and advises Kenyans that written constitutions “must not only be adopted, they must be kept.” In particular, Wilkins examines the role of the

Judiciary in keeping the constitution. Using a number of decisions of US courts on controversial issues such as abortion and same-sex marriage, he warns of the danger that judges may exercise “will,” as opposed to “judgment.” In his view, such issues should not be resolved by courts, but by citizens engaging “in open and honest political discussions.” He therefore advises that when establishing a new written constitution Kenya should recognize that judges, like elected officials as well, can also exceed their powers. Professor Wilkins further suggests the inclusion of a constitutional provision protecting the fundamental right of self-governance from autocratic judicial control as a remedy against this potential danger.

Migai Akech deals with the “Ethics of the Rule of Law: Impunity, Public Perceptions of Justice and Governance in Kenya”. Akech stresses the prevalent culture of impunity in both private and public actors. This culture of impunity, Akech says, is an impediment to progress and allows for the misuse of law by legal masters for the selfish interests of the moneyed few. Akech paper tries to answer the following two questions:

- (a) What has brought about the culture of impunity that is prevalent in Kenya today?
- (b) Can legal reform engender a culture or respect for the institution of law?

Akech also cites a problem in Kenya’s justice system, where the law is viewed by the majority as a tool for the benefit of a certain elite. He rightly points out that the legal process should inspire confidence in the people.

In his paper, Akech identifies the functions of Law and proposes that a culture of legality is an essential component of the Rule of Law. Akech adds that since the establishment of “the rule of law” depends in part on the confidence a country’s citizenry have in the law, appropriate studies should be carried out in order to identify the citizen’s perceptions and correct them to the extent possible.

Akech paper stresses the paramount importance of ending the current culture of impunity if the country is to advance and achieve development goals.

David Lutz deals with the Philosophical Foundations of Governance Institutions. Lutz, sheds light on the sad state of affairs in Kenya and Africa in general, suggests that the main reason why governance institutions have failed is because the kind of governance system adopted was not intended for indigenous Africa but was grafted, as it were, by colonialists and neo-colonialists without due regard to their compatibility with already existing systems.

Lutz revives the debate about what kind of government is best suited for Kenya – especially with regard to Federalism (Majimboism) and Central Governance. Lutz says that governance roles may be split into two: those which are best left to the

local governance structures to handle; and those which are best left to central governments, for various factors, among them the economy of scale.

Lutz concludes that a well-conceived and socially compatible federalism will preserve cultural traditions and at the same time preserve national cohesion. Lutz also equates good governance to an ethical culture. An ethical culture must be rooted in sound morality, which must be passed on right from childhood in the family. The family in turn is influenced immensely by its cultural setting. Therefore, Lutz concludes that strong family values and good cultural traditions are essential for the proper and sustainable development of Kenya. Inculcating these ethical and moral values is first and foremost a duty of the family. Citing Plato, he says that if a country's citizens and hence its leaders are ethical and just, if they are good, then it certainly follows that its governance systems will be good. "The virtues of the state are inseparable from the virtues of its citizens".

Bethwell Ogot agrees with Lutz by arguing that in many African countries the democratic way has been more an imposition from foreign economic and political powers than a sincere consensus of the African leaders. Ogot poses a challenging question: What is it that is African about African politics? Professor Ogot analyses the current system and suggests that the kind of democracy present in Africa, and specifically in Kenya, is what the leaders perceive the West conceives as democracy, especially marked by multiparty pluralism. However, in Kenya this is no more than a mockery, as shown by the lack of commitment to political ideals and by politicians jumping from party to party to suit the tenor of the times. Ought we rather have our own indigenous democracy? Through this question, Ogot invites the audience to reflect in order to rediscover African cultural and political heritage.

Along similar lines, Emma Oketch explains that the Westphalian model of governance and politics was transplanted/grafted onto the existing Traditional African governments—with the hope that this Westphalian system would transcend cultural barriers to transform these African states into nations. Oketch looks into the *Use of Traditional Conflict Resolution Methods in the Nation-State Conflicts in Africa*. She explains that as decades of African history testify, the conflict between the state and the nation, evidenced by years of war and conflict, ethnicity and tribalism—is still alive in the continent.

Oketch cites the examples of Deng and Markakis who developed the theory that ethnicity does not breed conflict – but only some fractured elites who maliciously accentuate ethnic differences, seeking to benefit from the conflict by acquiring power and resources. Development into a nation implies a lasting ethnic

conflict management process, since ethnic conflict will never be really eliminated, it can only be managed.

In Oketch's view there are both traditional as well as modern methods of conflict management. Modern methods such as confidence building, hegemonic control, third party intervention, external control, federalism, power sharing are effective but not sufficient, for they do not take into account all the domestic variables that come into play in any conflict. Instead, traditional methods, whose emphasis is mainly reconciliation, integration, building relationships and solidarity, strengthen the community.

Oketch explains that neither of the two methods are sufficient by themselves. However, the most effective solution lies in a careful combination of the two methods. This has been applied in various countries with varying degrees of success, for example Rwanda, Angola, Ethiopia. She also uses the example of Somalia which has had some success in resolving inter-clan disputes that are the hallmark of the Somali conflict, especially in the North. The conflict resolution method used in this region was mostly traditional (involving dialogue between elders, compensation, among other things). The South tried the same traditional bottom up approach but because of some complex factors involved, it failed. Thereafter, a UN-led force tried a top-down approach, again without success. With this she proves that none of the methods can be claimed to be a panacea to ethnic conflicts. What is required is a careful situational analysis, then a proper application of both traditional and modern methods of conflict resolution depending on the status on the ground. Oketch also proposes a working relationship between the state and the community, integrating community groups, for example elders into social and national policy-making bodies.

Christine Gichure focused on "Education and the Problems of Moral Values: The Case of Kenya". In her paper, Gichure faults Western Education for alienating African students from their native culture. She espouses the richness of African Traditional education with its emphasis on morality, reverence and knowledge on practical living. She argues that it does not matter whether African traditional or Modern education is better. What matters is that the philosophy underlying any education curriculum must have as the aim a holistic human formation including value education, virtue and morality. Gichure then suggest that what Kenya needs is a combination of the best of both Traditional African and Modern education. She therefore posits that the current education system and its curricula do not teach the student how to live well and happily, how to be good. If the youth are to be

equipped with this kind of knowledge, there has to be a major rethink of the current status.

Along the same lines, Justus Mbae, paraphrasing Shakespeare, entitled his paper: “Something Is Rotten in the State of Kenya”. Mbae perceives education, first and foremost as an end, a moral end, by itself and not a means to survival or financial gain. Mbae argues that a truly educated person is a morally upright person. Mbae also differentiates education from schooling; the educated person learns and sees the value of giving back some service to the community and putting its interest before his own. According to Mbae, if education does not produce a good person, a person of integrity, a good citizen, it is a failed process – and we cannot call it education. Education aims at inculcating values in addition to good theoretical knowledge.

Mbae adds that education as a process begins right from childhood and this is why the most important educator is the family – the parents. So, if the greatest educator fails, what is passed to subsidiary educators risks failing as well.

Mbae lists several threats to the family institution and puts across several indicators to substantiate the fact that the educational fabric in Kenyan society is rotten. The innumerable mega-corruption scandals, the post-election violence, the school unrest, tribalism and ethnicity are all linked to a defective education system driven by a utilitarian philosophy that emphasizes consumerism, self-centeredness and “diploma disease” – a condition characterized by desire to have as many academic certificates as possible with the misplaced belief that the more you have the more well-off you shall be. His logic is that if the education system can produce a person with integrity and dignity, together with the learning and skill, then we will have a better society.

Mbae proposes a return to a value-centred education system with active participation of the parents, to the extent of even having a say in the education curriculum, in collaboration with other education stakeholders.

Sotz addressed in his presentation the example of Strathmore University’s history in the Human and Social Development of the Region. Sotz’s paper first analyzes the pros and cons of the so called “module two” – alternative/parallel University program for self-sponsored students. These events may have put the quality and relevance of the Kenyan Education system and its underlying philosophy on the spot. The paper attempts to show the social impact that university education should have, reflecting on the example of Strathmore University. Sotz explains the difficulty of balancing the University’s duty to society

and the pressure on the University to stay ahead of the competition by merely concentrating on churning out more certificates and papers and the eventual damage such approach can cause in the true process of educating the individual.

The paper by Martyn Drakard, also on education, analysed the impact of learning in conflict areas, particularly in Northern Uganda and Rwanda. Drakard, with immense teaching experience in Africa, explains the ravages of the two decades of civil war in Northern Uganda, especially in Gulu, Lira and Arua. He compares this with the impact of conflict (the Rwandan Genocide) on the learning and education system in Rwanda. In Uganda the education system was devastated and learning was greatly hampered. The effects of the war on the education system are still being felt twenty years on. The Rwandan case is different: despite the 1994 massacre, the massive killings and the trauma that ensued, the education system has moved ahead impressively and great gains have been made. He therefore points out that good and visionary leadership both nationally and at the school level is essential. In concurrence with other speakers, Mr Drakard agrees that we need an education system that allows parents to actively participate in their children's education and the importance of teaching morality and ethics so as to produce good citizens.

During the session on the land issue, Patricia Kameri-Mbote discussed the legal and ethical dimensions of the *Land Question in Kenya*. One of the main reasons why land is such a contentious issue in Kenya, according to Kameri-Mbote, is that a high percentage of current land owners hold titles unjustly or illegally acquired through historical injustices and abuse of power. Kameri-Mbote argues that there should be a redistribution of land to address these unresolved injustices. In her view, the sanctity of title, although guaranteed under the constitution, should not be upheld where the title was acquired illegally or unjustly.

Kameri-Mbote also points out that: the Kenyan economy relies predominantly on land, which therefore makes land distribution and access critical.

In his paper JA Ainsley proposes that the best way out of the inequality and injustices associated with land is to impose a land value tax. The tax is to be levied on the value of the land, thus ensuring that land owners contribute to the community, develop land or pass on idle property to those in real need. The idea of the tax is ultimately to prevent usury and exploitation through land ownership, thus encouraging the creation of wealth. Ainsley backs his theory with examples of places where the Land Tax Valuation or its variation has worked, such as Pennsylvania and Taiwan.

Along similar lines, Tom Konyimbih presented a paper on: *Land Holding and Ethics: Critical Issues for Kenya's Rural Economy*. He proposes a practical system of Land Value Taxation. Konyimbih points out that according to statistical data, if Kenya had put in place a Land Value Tax in the 2007 fiscal year, the Country would have reaped shillings 351 million from land tax and rates.

Konyimbih faults policy makers for the poor land policies in effect in the country. He cites as an example, the settlement schemes, where landless people were settled without regard to the fact that the indigenous communities would feel threatened in future and that the same tension would be used by politicians to further their own political ends, of course abusing the fragility of the country's political maturity, its weak sense of nationhood and strong ethnic leanings.

Norton-Griffiths' paper attempts to demonstrate serious disconnects between the provisions of the Draft National Land Policy, on the one hand, and the hopes and aspirations of the body civic, on the other. According to Norton-Griffiths, the policy formulation process for the DNLP has been deficient and riddled with procedural improprieties. The consequence of these failings is that if the policy proposals submitted to the Government are adopted, they will alienate, according to Norton Griffiths, some 9.2 million pastoralists and around 3.5 million holders of freehold and leasehold agricultural, domestic and commercial titles. Seen from this perspective, Norton argues, the Draft National Land Policy is for most of its ideological and intellectual sponsors within Kenya a kind of Trojan Horse that could, if implemented, be used to undercut the existing establishment and subvert many of the mechanisms by which this elite has been able to gather and maintain wealth and political influence over the last 40 years. Norton-Griffiths concludes that the DNLP is less about land *per se* than about revolutionising strategic parts of the government machinery for allocating and governing land and renewable resources, thus creating the foundation for a new political and economic order.

These scholarly presentations lead us to the realisation that we are unavoidably part of a suffering world where inequality grows exponentially. We are all children of the 20th Century. Its legacy marks each one of us and we cannot deny it, nor can we run away from it. We cannot change the past, but we can change the future through the present. We can dream of a better world.

Without a proper understanding of man, we cannot grasp the nature and truth of our society, we cannot understand our problems. Today, many speak of human rights, equality and democracy. Few, however, speak of human duties; fewer still speak of truth. We need to awaken our patriotism, the sense of nation and the idea of belonging... or else we risk losing it all.

These academic papers represent an academic and intellectual attempt to understand the problems of our nation, our own problems. This requires self-examination: where and when did we go wrong? Unless we examine our social conscience, we will never learn from the mistakes of the past; and a society that cannot learn from its past cannot project itself into the future. It lives, what in grammar is called, an imperfect present. We hope our leaders, our people and each one of us can learn the lesson.

CREATING A NEW CONSTITUTIONAL ORDER: KENYA'S PREDICAMENT

Yash Pal Ghai

I. PROMISE OF THE CONSTITUTION

There is a renewed interest in a new constitutional order in Kenya. A bad and outdated constitution is blamed for the post-election crisis: the President able to pack the Electoral Commission with his cronies in breach shortly before the election; a largely unaccountable Electoral Commission declaring presidential election results without proper counting or reliable records; enormous powers vested in the office of, or illegally appropriated by, the President; the centralisation of power in Nairobi; the lack of public participation; the lack of autonomy; effectiveness and legitimacy of state institutions, particularly those for accountability and justice – judges, police, prosecution, attorney general; opportunistic political parties and unprincipled politicians, and resulting corruption and wide-scale impunity.

Many Kenyans believe that if the Bomas Constitution had been adopted before the last general elections, the country would have avoided the terrible tragedy that befell the people. Hundreds of thousands of Kenyans who participated actively, enthusiastically, in the work of the Constitution of Kenya Review Commission and the National Constitutional Conference at Bomas did so because of their expectations that a new constitution, made by the people themselves, would lead to a better life: their basic needs would be met and their rights protected, their land problems solved, economic and social development would follow, new roads and markets would open economic opportunities, and corruption would be eliminated. Eminent Persons who assisted political leaders to find accommodation were convinced that Kenya needed a new constitution, and the National Accord negotiated by Kofi Annan provided for a new constitution within a year. Most of their recommendations for constitutional and legal reform are similar to the provisions of the Bomas constitution.

Would Kenya have been a better place today if Politicians had not engineered the sabotage of the Bomas Constitution? This is a difficult question, for we must make a distinction between the enactment of a constitution and the adherence to its values and implementation of its provisions. A constitution by itself makes no difference. I intend to consider the impact of constitutions and the difficulties of creating a new constitutional order. In recent decades numerous states have adopted new constitutions or embarked upon a journey to give themselves a new constitution, in the belief that the constitution would solve complex problems of

modern societies, strengthen state institutions, ensure integrity and accountability of governments, promote human rights and social justice, and lead to the renewal of society and the affirmation of its values. Others have turned to constitutional negotiations and reform as a way out of long term conflicts, to find a basis for peaceful co-existence. In most cases these expectations have not materialised. Why?

II. PROCESS FOR AND DRAFT OF THE BOMAS CONSTITUTION

In order to set the context for answering this question, I want to quote from my address to the Kenya National Constitutional Conference (popularly known as “Bomas”, where it met) when it was convened in March 2003. I was reporting on the work and recommendations of the Constitution of Kenya Review Commission (CKRC), and began by giving reasons for and the background to the review.

BACKGROUND TO THE REVIEW

“The current struggle for constitutional reform began over 12 years ago. Many people gave their lives and limbs, and others have made numerous sacrifices, in their attempt to give us a better instrument of governance. These people were driven by their love of the country and the passion for social justice and the dignity of individuals and communities. It has now fallen upon this Conference to complete the task they began. I am sure that all the delegates realise the heavy moral and intellectual responsibilities that have been cast upon them.

“Very briefly, the background to the review of the constitution lies in our history of the last forty years in the dismantling of freedoms and democracy following independence; establishment of one-party rule; enactment of draconian laws like preventive detention, and the intimidation of those who dared to criticise the government; emergence of a highly personalised system of rule, with heavy reliance on patronage; corruption and plunder of the state; the decline of the rule of law; the transformation of the police from being protectors of the people to becoming their oppressors; the subordination of the judiciary to the executive; and marginalisation of social groups and communities and the sufferings of extreme poverty.

“In this environment it became irrelevant whether an act of the president or the Government was based on legal authority or not – presidential word substituted for the law. Predictability, which depends on clear rules of law, became dependent on the ability to read the whims of the President. There was massive misappropriation of state resources, and unbelievable greed in which the concerns

of the nation, of present and future generations, were sacrificed to personal accumulation.

“The institutions of the government and economy decayed under the shadow of a powerful president and his inner circle. These institutions became merely instruments of support to the government, and electoral processes were twisted to serve the ruling party. Power was centralised at the centre, and in the hands of the President. There was no effective separation of powers. Parliament became ineffective. There were few institutions for accountability, such as an ombudsman, and such institutions as existed, like the Auditor-General, or the Attorney-General, were rendered toothless. There was no easy access to public service or other state agencies; merit as the criterion for appointment or promotion was replaced by political or ethnic connections, or monetary payments. There was a sharp decline in the economy and the breakdown of the infrastructure; decreasing levels of production and export; illegal acquisition of huge tracts of land without productivity; and massive unemployment. People increasingly lost access to the most basic necessities of life, their life scourged by poverty, while a few lived in unimaginable affluence. Guarantees of the security of person or business disappeared. Consequently, there was a massive retreat from public life, an inward-lookingness, a lack of openness and trust; and pervasive fear which drove many into exile.

“The movement for reform was a response to this total collapse of constitutionalism, that is to say, the arbitrariness of the exercise of state power, the refusal of the government to respect limits on its power or authority, the disregard of the rights of people, the absence of checks and balances, and consequent lack of the separation of powers. The movement took the form of constitutional reform because the problems the country faced were seen to arise from bad and oppressive governance, and the lack of respect for constitutionalism. This reform agenda found its way, via a series of national conferences, into the Constitution of Kenya Review Act. The Act provides a vision of Kenya as the guide to the new constitution.

VISION OF KENYA

“A constitution is many things. One of these is a vision of the country and a statement of its values. This indeed has to be the starting point for designing the constitution. What is the vision of Kenya on which the CKRC operated? The Review Act was our starting point. The Act envisages a republic which is at peace with itself and its neighbours. The welfare of the people is its primary goal. This goal is to be attained through national unity and a consensual basis of authority and

decision making. But the concept of the welfare of the people does not mean that the people are passive recipients of state largesse. Kenyans are no longer subjects subordinated to external authority. They are citizens who control their destiny and organise state and society through the values and procedures of democracy. The democracy through which Kenyans decide their destiny is not rule by majority, without regard to the interests of others; is based on the protection of the rights of individuals and communities. Rights constitute the fundamentals of our democracy because they protect the legitimate space of the autonomy of individuals and communities, and compel the state to respect basic rights and procedures. Nor is the democracy envisaged in the Act merely representative, in which people vote every five years and then become powerless. Instead, it envisages a citizenry actively engaged in public affairs. These citizens participate continuously in the governance of the country through the devolution and exercise of power. They keep a constant vigil over those who claim to act on their behalf, politicians and governments. It is a democracy in which the free exchange of ideas is actively promoted, particularly by giving people information and resources.

“There is also the vision of Kenya as a nation of great diversity – of ethnic origins, religion, culture, traditions and geography – living in peace and harmony. The Act says that we must respect and cherish this diversity, for we are the richer as a result. The accommodation of diversity is not easy. Total recognition of diversity in all its manifestations will make us a patchwork of communities, not a nation, with little to hold us together and no values or procedures to mediate relations between communities. Yet to force us all in a common mould is to deny individuals and communities the deepest impulses that define their identity – and to lay the foundations of conflict. A balance has to be struck, assisted by a core set of national values and aspirations – without unnecessarily jeopardising the legitimate interests of minorities. It was evident to the Commission as it toured the country and met people in all provinces that they do subscribe to a common core of values, and that the differences between the various communities pose no threat to our unity or common purpose, especially when the differences can be accommodated in the private or familial sphere. It is within this framework that we should resolve the controversy about Kadhi courts and the limited application of the *sharia* to Muslims.

“Another component of the vision of Kenya is that of a caring society in which the basic needs of all its members are provided for. There is no reason why any Kenyan should be without shelter, or go hungry, or be deprived of opportunities for education and employment. Society bears special responsibilities for the welfare of its vulnerable members – the aged, the children, the disabled and women.

Through the Review Act, Kenyans have committed themselves to an equitable framework for economic growth and equitable access to national resources in which the basic needs of Kenyans would be met. I believe this formula captures very well the nature of our obligations to the disadvantaged. It is not charity that the disadvantaged ask of us, but fair policies and opportunities. The enormous disparities that exist in our society between the rich and poor, the privileged and the disadvantaged are not the natural order of things. They are man-made, by the plunder of state and communal resources, and by policies that favour particular groups and classes. Kenyans want the proper and honest management of our national resources and they want equal opportunities for all. They want a caring, humane and just society. No country can be proud of itself if over 60% of its people suffer in extreme poverty while 10% live in great affluence.

“We also have a vision of Kenya as a responsible member of Africa and the international community. We want to play our proper role in the emerging global politics and institutions. We want to promote and facilitate regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights.

“To translate this vision into a constitutional instrument was the mandate of the Commission and is now that of the Conference. But the Act also says that we have to reflect the wishes of the people. There is a great deal that unites Kenyans in their views on where the nation is now, and what went wrong in the past and what the future should be. In their numerous submissions, individuals, communities and organisations largely endorsed the vision of Kenya described above – in part by emphatically rejecting its opposite, which is the reality of Kenya as they perceived it (corrupt, uncaring, exclusionary, groups large and small held in contempt and mired in poverty). People want a Kenya which respects human dignity, ensures social justice, provides for the disadvantaged, does not marginalise communities or minorities, has proper respect for the culture of groups who want to preserve their traditional life-style, and treats nature with greater consideration for present and future generations. People want more control over decisions which affect their lives and bring government closer to them. They want leaders who are honest, responsive and accountable. It is the responsibility of this Conference to lay the foundations for this vision.”

The process of making the draft of the CKRC was extremely participatory, and Bomas itself was broadly representative of the communities and regions of the country. Despite massive intervention by the President and some of his ministers to subvert Bomas, most provisions of the Constitution were adopted by unanimity

and the rest by at least a two-thirds majority, in accordance with the Review Act. Yet, despite this popular engagement and support, the Constitution was not brought into force, by a faction of the cabinet (who, when in opposition, were supporters of the review process) acting in cahoots with the judiciary (which was allegedly reformed by then). This outcome alerts us to the difficulties of creating a new constitutional order, and the ability of politicians to subvert the popular will.

III. CONSTITUTIONALISM AND CONSTITUTIONAL ORDER

The principal idea behind constitutionalism is the limitation of the power of the state. It is assumed that the function of the state is to provide security for its citizens and other residents and to enable them to lead a life that is meaningful to them. For this purpose the state must be vested with considerable powers of government, to protect the rights of citizens, maintain law and order, with the assistance of police if necessary, and defend the country against foreign invasion. It must provide the machinery for justice, including a body of laws and courts to enforce them. For these purposes it must have the power to tax the people and to incur expenditure on their behalf, in order to run the machinery of government. As society and economy have become increasingly complex and as relations with foreign powers and international agencies have become critical for any country, the state must have significant powers of regulation and the ability to operate at the international level. The state has incurred numerous international obligations under treaties and conventions, and there must be authority to discharge them. At home it must provide the framework and the infrastructure for the economy and ensure for its citizens access to education, health, shelter, and employment opportunities. For these reasons the powers of the state are constantly increasing. There is a real danger that these powers could be abused, and instead of serving the people, they can be used to suppress them.

That is why the essential principle of constitutionalism is the limitation of state power. But the principle is exceedingly hard to maintain, for reasons given above, and the fact that the state has become very powerful. In earlier times the authority of the state was counter-balanced by power in civil society and other centres. In Africa the state is both powerful and weak. It is weak internationally, dependent on handouts from western governments and some of its essential tasks performed by international organisations or civil society groups. But it is strong internally in the sense that it represents a greater concentration, than other groups, of financial and other resources, bureaucracy, network of security forces, and above all, armed might. It plays an important, even if negative, role in the economy, in dispersing resources collected from the people and outside donors and lenders, allocating

contracts, dispensing patronage through state corporations and public offices. Those in charge of the apparatus of the state have endless opportunities for personal aggrandisement – and amassing fortunes through corruption. Thus those who are in charge of the exercise of the power of the state have very little interest in or incentive for limiting these powers. Other groups in society lack the capacity – or think that they lack the capacity – to impose controls, much less accountability, on the government.

The idea of constitutionalism as we understand it is based on the experience of Western states. Central to that is an agreement under which the people have delegated power to the government – in most cases the agreement takes the form of a constitution. In these states, the constitution represents the form of government, the structure of civil society, and the relations between the state and citizens that have developed over a long historical experience, that are broadly acceptable to the people (the elite and masses) of the country. The constitution does not so much create public power or the relations between citizens among themselves, or between them and the state, but reflects them as worked out in historical compromises which have ensured a substantial measure of stability and predictability. In Africa the constitution has been regarded primarily as the means for creating structures and powers of the state, and the limitations on them. They seldom represent any continuity in the development of public power. They may not, indeed do not, have much connection with the reality of where power is located or deposited, or its accountability to society.

However, we continue to repose faith, or pretend to, in the document called the constitution, in the face of overwhelming evidence that it is a piece of paper (or rather, pieces of paper – constitutions have become very long!). The constitution is not a self-operating or self-executing instrument. The real task of establishing constitutionalism lies in other spheres: politics as construction of values and policies; the judiciary entrusted with the task of authoritative interpretation of the constitution; the rise of professionalism and civic associations to suffuse the public space with economic and social values and practices; enlightened leadership – and public participation and vigilance of the people. The emphasis on constitutions as paper instruments to organise the state (to the absurd point in some African countries that a new constitution must replace the old not only in cases of regime change, but also government change) has in that sense done Africa a disservice, distracting attention from the real task of building constitutionalism.

But to return to the Western artefacts of constitutionalism (which are massively reproduced in African Constitutions). A constitutional regime is governed by a

constitution which is supreme and represents the highest ideals of the nation; where state authority is subject to limits which arise from the rights of the people and the principles of good government, in which there is separation of powers of the state, horizontally, and frequently vertically as well, and checks and balances, where the judiciary is competent, honest and independent; where people elect and remove governments, and hold them responsible and accountable, with the help of independent institutions. A key element is the rule of law, which requires that state authorities and all individuals are bound by the law; policies must be based on law and administrative discretion must be exercised in accordance with it. The law itself must be a reflection of the popular will, arrived at through a prescribed and fair procedure.

This much is well understood now, as characteristics of a good constitution. The notion of a constitutional order is, however, broader than merely the text of the constitution. The constitutional order represents a fundamental commitment to the norms and procedures of the constitution. It has more to do with behaviour, practice, and internalisation of norms than the constitutional text. A central feature is the impersonalisation of power. Power belongs to state offices, not to individuals, however exalted. The purpose for which power must be used and the mode of its exercise are set out in the law. The holders of even the highest state offices are subject to the law, and are not above it. This aspect of constitutionalism has proved extremely hard to realise in Africa – where public office has its own aura, and expectations of the people merely encourage the whimsical, or capricious and biased, exercise of their powers.

But to make the constitution as the foundation of power, we must first understand the background to and the nature of the constitution. A constitution contributes to democracy by:

- (a) affirming common values and identities without which there cannot be a political community;
- (b) prescribing rules to determine membership of that community;
- (c) promising physical and emotional security by state monopolisation, for legitimate purposes, of the use of force;
- (d) agreeing on the ways in which and the institutions through which state power is to be exercised;
- (e) providing for the participation of citizens in affairs of the state, particularly through elections, and other forms of social action;
- (f) protecting rights (empowering citizens as well as limiting state action);

- (g) establishing rules for peaceful changes in government;
- (h) ensuring predictability of state action and security of private transactions through the legal system;
- (i) establishing procedures for dispute settlement; and
- (j) providing clear and consensual procedures for change of these fundamental arrangements.

These principles and provisions are necessary to maintain public values, and the fair and impartial exercise of power; to enable an orderly and peaceful society, to protect the rights of individuals and communities, and to promote the proper management of resources and the development of the economy. They ensure the legitimacy of the state and its capacity to deal with disputes between citizens and communities.

IV. OBSTACLES TO ESTABLISHING CONSTITUTIONALISM

A particular difficulty in achieving these objectives in many new states, given colonial history and the diversity of their people, are the considerable problems in developing a sense of nationalism that encompasses the whole country. There will probably be stronger allegiances to the community or the region, and perhaps various, different world views. It is likely that few institutions have previously spanned these communities that now constitute the people of the state. In states where society provides cohesion, common values and stability, the role of the constitution is secondary, concerned more with law making and administration than with promoting national unity, which is, erroneously, taken for granted. In post-colonial multi-ethnic states, “nation building” is an essential task of the constitution, involving agreeing on the purposes of the state and on the basis on which different communities co-exist and share a common public space. In other words, its task is to establish a common political community, based on consensus. Almost everywhere this has proved an extraordinarily difficult task, because of the diminution of the value of citizenship and the corresponding constitutional recognition of communities as bearer of rights and obligations – through a number of legal devices, such as special electoral roles, regional autonomies, special land rights for communities, but more widely and even more negatively, through the political manipulation of ethnicity and administrative practices.

In the Lockean and Rousseauian terms, “nation building” is the first of the two contracts that constitute a state (first agreeing to form a political community or “nation”, and then agreeing to form a state). In many places, the two contracts have been conflated, so that the agreement on forming a community is achieved

simultaneously with establishing values and institutions of the state – and indeed through it. This renders very difficult not only constitution making (as the African experience demonstrates) but also its implementation, because it is impossible to rely on balances within civil society and its institutions as they operate in states with longer common histories and more shared cultural values.

Constitutions in the older states are the result of gradual, organic growth. To a considerable extent they reflect the values and forces of civil society, and enable the groups that dominate society and the economy to use the mechanism of the state to, politically, impose their will and interests on the people. The real basis of their dominance lies in society, not in the state, which can afford many manifestations of democracy and rights. On the other hand, in the immediate post-independence period, those who accede to political power seldom have a sufficiently strong base in society or economy. They thus use the apparatus of the state to accumulate power and wealth (what Marx called “primitive accumulation”). Yet it is not possible in the post-colonial period, due to the force of the idea of democracy, to rule as the colonisers did, with a large measure of legally sanctioned coercion.

In brief, historically, the process of formation of the political community preceded the establishment of democracy. Today, in many countries, constitutions have to perform these two tasks, now enormously complicated, simultaneously.² As there can be serious tensions between the two tasks, the role of the constitution in establishing democracy is exceedingly complex and difficult. In order to understand the difficulty of creating a constitutional order in these circumstances, it is necessary to appreciate that the constitution, as fundamental law, is supposed to provide the framework within which state laws and policies must be conducted. It seeks to ensure the smooth operation of the political system by de-personalising power, and by channelling the expression of views and competition through prescribed institutions in accordance with clearly understood and valued procedures as well as facilitating the resolution of differences and disputes that inevitably arise. The constitution provides both legality and ideology.

But pre-colonial and colonial orders compete with the very different orientation of the constitutional order in the sense in which I use that phrase here. The first (as affected by colonialism) is communal and patrimonial, and the second

2 Writing about the 13 original colonies that formed the USA, newly independent from Britain, dominated by a white, male elite, Madison was able to say, ‘... the idea of a compact among those who are parties to a Gov’t is a fundamental principle of free government. The original compact is the one implied or presumed, but nowhere reduced to writing, by which people agree to form one society. The next is a compact, here for the first time reduced to writing, by which the people in their social state agree to a Gov’t over them’ (quoted in Berns: 121).

imposed and authoritarian. Neither is suitable for an independent, modern state. But the constitution for a modern state is not necessarily rooted in the reality of these post-colonial states (in considerable part because the modern state is also not rooted there). The modern state is an imported artefact that cannot be sustained through older governance models, but these models continue to compete with it. Yet the state is the most powerful force in the land, and the principal site of accumulation. Access to the control of the state, alienated from – but subordinating – society, produces various discontinuities and distortions in social and political relations, and in the exercise of authority.

V. KENYA'S EXPERIENCE

Most elements of this framework are unacceptable to those who gain access to state power, for they interfere with their primary objective of accumulation. This has been the essence of the Kenya experience, where constitutionally sanctioned power has been exercised or abused in the name of ethnicity (made possible because no political leader has tried to make us a “nation” with social solidarity) but in practice deployed it for personal aggrandisement. As the analysis in the Waki Report on Post Election Violence in Kenya so clearly and vividly demonstrates, the process of accumulation cannot easily be secured within the parameters of a democratic constitution through mechanisms and procedures for accountability. Indeed the point that emerges with sharp and sad clarity is that it is only by constant and systemic violations of the constitution and the law that this political class is able to accumulate and establish its control over society-and its opponents. I have already given copious examples of these violations-and the accomplices in the state structure who facilitate them.

The horrendous consequences of these violations are graphically described in the Waki Report: corruption, institutionalisation of violence, the extensive use of militias, and the loss of the state monopoly of force (with weaknesses and divisions in state security forces). In particular the Report emphasises the role and prevalence of violence in Kenya politics and society. It attributes many failings of the state to the personalisation of power in the president (and with it the absence of the separation of powers).

The economy has become closely intertwined with state patronage and ethnic politics, and leads business people to become architects of violence, and to collude in other violations of the law. There is little accountability for the exercise of public power. Impunity for the friends of the regime and for compliant state officials is rampant-and indulged in despite public outcry. All these demonstrate the absence of the rule of law. The way successive presidents have governed (or rather

misgoverned) Kenya is proof that these violations are not deviations from the norms; in fact they are the norm.

Serious consequences in terms of the loss of legitimacy of the state follow from this. The state is not perceived as a social and political force for the common good. It is regarded, accurately, as partisan, throwing its weight behind specific communities and interests. The subordination of the electoral commission, the police, and the judiciary to the executive has resulted in their inability to resolve national problems, though this is why they are set up, with independent powers. The police are particularly singled out by the Waki Commission for their failure to ensure Kenyans' security, and in the result are held responsible for numerous murders, rapes, and the displacement of the people. They are no longer able or willing to protect the people against violence and plunder by private and politician sponsored militias. The judiciary is so discredited that no-one believed that it was capable of impartial adjudication of election disputes. The Waki Commission doubts the veracity of the statements of the Attorney-General about his attempts to enforce the law, leading the reader to believe that he has been compliant in impunities that have been enjoyed by so many, for so long, for the most serious of offences. The Waki Commission concludes that "Over time, this deliberate use of violence by politicians to obtain power since the early 1990s, plus the decision not to punish perpetrators has led to a culture of impunity and a constant escalation of violence". The government and politicians have not only sanctioned violence, but they have also ethnicised politics and violence. Consequently the state has failed to perform functions intimately connected with the exercise of public power, indeed major reasons why we establish a state in the first place.

Apart from the self-interest of politicians, there are two other, related, dimensions of contemporary constitutions that complicate their implementation. The first is the local and international pressures towards a participatory process, as in Kenya with the Bomas process, designed essentially by civic groups in a series of meetings at Safari Park and effectively imposed on President Moi. Often a participatory process can trigger tensions between politicians and the public. Many problems about the implementation and observance of the constitution relate to this imbalance between the people and the politicians. Participatory processes like the 2001-2004 constitution review in Kenya give people a sense of their authority and an opportunity to influence the outcome—which they use to settle scores with politicians. Politicians fight back to derail the process, hijack the constitution (as happened partially in Kenya), or, if they are not able to do so, once in power they disregard its inconvenient provisions—such as public accountability, anti-corruption mechanisms, equity and social justice. The solidarity among politicians, at least on

their interests as a class, is stronger and deeper than their public squabbles suggest. People do get a chance at elections to deliver their verdict on the conduct of the government, but elections, as Kenya's experience shows, are an impotent, at best an uncertain, weapon. The rigging of elections (standard practice in many countries) is the ultimate denial of people's power.

The second dimension is that the older constitutions were concerned largely with the access to state power and the regulation of that power (the separation of powers, independent judiciaries, bills of rights) – indeed Jon Elster, an outstanding scholar of constitution making, says that these are the only proper tasks of a constitution. But he is in a minority. The modern constitution is also a social charter (and not only in the countries of Southern Europe, as Spanish and Portuguese constitutions demonstrate). It is increasingly concerned, for example, with manifestations of identity, social justice, redress of past injustices, use and regulation of national resources, and the environment. Some of these matters command considerable degrees of support, but others are controversial, and agreement is possible only through ambiguities. The result is that an ambitious, but sometimes imprecise, social and economic agenda is inscribed in the constitution, prompted by people's participation in the constitution-making process. But the will of politicians to accept and implement the values and procedures of the constitution, as I have shown, is lacking-and without it not much can be accomplished.

VI. ESTABLISHING CONSTITUTIONAL ORDER

At a technical level, the enforcement of a constitution revolves around three elements: 'implementing, promoting and safeguarding'. To implement a constitution means to give full expression to its provisions: making new laws and policies to give effect to them, setting up new institutions (and vesting them with powers and resources adequate for their responsibilities), and repealing laws inconsistent with them.

To promote the constitution means enforcing these laws, respecting rights and freedoms of the people, developing constitutional norms, sustaining institutions and the rule of law, holding regular elections, providing access to justice, resolving disputes in accordance with the constitution, and facilitating the participation of the people in public and state affairs.

Safeguarding the constitution means to protect the constitution against hasty amendments which detract from the values of democracy, constitutionalism and the rule of law. Attacks against which it must be safeguarded also include the

distortion of constitutional norms through practice and disregard of the law and the avoidance of unnecessary resort to emergency powers. Safeguarding means, in extreme cases, protection against overthrow of the constitution through illegal measures such as military coups.

But the experience in Kenya and other places shows that technical issues are secondary to the political. It is one thing to make a constitution. It is quite another to breathe life into it, making it a living, vibrant document which affects, and hopefully improves, the reality of people's life. A living constitution is one which people use in their daily existence, which governs and controls the exercise of state power, and which promotes the values and aspirations expressed in it. The fortunes of a constitution are shaped by many factors: personalities and elites, political parties and other organisations, social structures, economic changes, traditions of constitutionalism – and by the rules and institutions in the constitution itself (such diversity that a distinguished political scientist, Jon Elster, argues, although not without opposition from other scholars like Sartori (1997) that it is impossible to predict the consequences of a constitution, because one cannot foretell the 'net long-term equilibrium effects of major institutional changes' and 'piecemeal social engineering is of little help as a remedy to this theoretical deficit').

For other reasons, despite the emphasis placed by Kofi Annan, other eminent Africans, Kenyans and the international community, on constitutional reform, there is no guarantee that many of the reforms proposed by them and the Kriegler and Waki Commissions will help to get Kenya out of the hole in which successive presidents and their confidants have placed it. I have said enough to indicate how vested interests, among politicians, businesspeople, and the bureaucracy will sabotage reforms (as they have done ever since Kenya's independence). Despite the ravages wreaked upon the state, it still remains the main means to accumulate wealth and power—and those who are in control of it will fight to maintain their control, regardless of the rules of the constitution.

It is hard to provide the answer to this dilemma: that the very sponsors of reform are its principal saboteurs. What we know is that constitutionalism cannot be willed; it must be established by deep commitment and sustained activity. The constitution cannot achieve any thing by itself: like Marx's commodities, it does not have arms and legs. It must be mobilized, acted upon, used, etc. This idea is also expressed by Granville Austin (2000),³ in his monumental study of the working

3 To give a further impression of a living constitution, end with another quotation from Austin's analysis (somewhat rosy in my view) of the Indian Constitution. He says the constitution is 'about politics and economics and conditions and culture, about politicians and civil servants and lawyers and judges and

and impact of the Indian Constitution, who says that a constitution, however living, is 'inert'. A constitution does not work, it is worked. He says his book is 'about those who acted upon the Constitution, how and why they did so, and about those the Constitution acted upon, or neglected. It is about Indians working their Constitution ...'

One way to understand the potential of a constitution to impose its imprint on state and society is to examine two key factors. One is internal to the constitution: the way in which it distributes power, the institutions it sets up for different tasks, modes of accountability, and methods for the enforcement of the constitution, including respect for and protection of human rights. The balances within the constitution can do something to guide state institutions and empower the people. It is perhaps safe to say that constitutions may succeed in setting up institutions and giving them authority, but they often fail in the fulfilment of national values or directive principles—for the paradoxical reason that those who accede to these institutions may have little commitment to the values (it is interesting to note in this context that at Bomas, politicians paid almost no attention to values, but were obsessed about institutions—knowing well that if they got hold of institutions, they would be able to ignore values). As we know, most African constitutions contain excellent values and procedures (as I describe briefly later), but they have for the most part, failed.

They have failed in substantial part because of the second factor, which is external to the constitution—and that is society. The constitution operates within society and seeks to influence its development. It may set out guidelines for the exercise of power and the aspirations that the state must fulfil. But society also impacts on the constitution, sometime giving it a push in the directions adopted in the constitution, and sometimes negating them. I have already indicated that in Africa we have placed unjustified reliance on the capacity of the constitution to influence society. I have also indicated that the political order intended to be set up by the constitution competes with other models and realities—and in the end it is society which has determined the extent to which the constitution will be observed, manipulated, or disregarded. We lack studies, in Africa, of the impact of

journalists and individuals, rich and desperately poor, and it is about success and failure and hope and despair and power and sacrifice and motivations, selfish and grand'. As a result, 'The Indian Constitution is a live document in a society rapidly changing and almost frenetically political. The touchstone for public, and many private affairs, the Constitution is employed daily, if not hourly, by citizens pursuing their personal interests or in their desire to serve the public good. The working of the Constitution so fully expresses the essentialness of the seamless web and so completely reveals the society that adopted it that its study truly is a window into India'. This is certainly one version of constitutionalism—and we in Kenya are a long way away from it.

society on constitutions – and not only our own societies, but also of external forces that bear on our lives. If there is to be a break through in constitutionalism in Africa, such studies will be the first step.

We know now that the essential pre-conditions of a constitutional state are missing in Kenya: an independent judiciary, honest electoral commissioners, absence of impunity, policies that are inclusive, the rule of law-and, most importantly, ethical and moral standards in public life. These difficulties are compounded by many unresolved problems of the past.

It is often stated that people's participation in the constitution-making process is essential for its success. There is undoubtedly some truth in this. But the CKRC and Bomas processes were highly participatory. People engaged actively in the review. In the process, they were educated into the broad principles of democratic and accountable government, the rights of the people, the principles of fairness and justice. Secondly, they were also empowered by the process, for they were, perhaps for the first time in our history, shown respect and listened to. The Constitution of Kenya Review Commission faithfully recorded their views and the Draft incorporated most of their recommendations. Thirdly, they acquired knowledge of the proposed constitution, understood how it would have protected their rights, promoted democracy, social justice, etc., and increased their ability to use its protective provisions. However, in the face of intransigence on the part of a political faction, they were unable to safeguard the Bomas Constitution. But, on the other hand, they were able to reject the mutilated version offered to them in the referendum. Perhaps in these contrasting acts lies the explanation of the inability of the people to secure the constitution. For various reasons they are unable to take initiatives, but given opportunities, as the CKRC process did, they do take advantage of them and express their preferences in no uncertain terms. People as a whole are unorganised; there are few institutions which give them opportunities for decision making, participation, or consultation. On their own, in fragmented communities and groups, they are unable to assert their claims against the might and the wiles of the state.

The importance of redressing the balance between politicians and people remains. It requires the genuine empowerment of the people, promoting an awareness of public issues and procedures, the role of public institutions, familiarity with their constitutional rights and the mechanisms to protect and mobilize them; and institutions and opportunities to express their views and to demand accountability. But the privileged few (particularly politicians) have little interest in this form of empowerment. The Bomas Constitution provided many entry points

for civil society initiatives. Civil society institutions could bring legal actions on behalf of the disadvantaged and the voiceless, they could work with state institutions to establish standards and benchmarks for social progress and justice, they could mobilise the people to take advantage of provisions for public participation, they could inform and educate on constitutional issues, they could have played a critical role in the reporting to regional and international bodies on the fulfilment of Kenya international obligations on human rights, they could have benefited from the freedom of information. This approach must continue, for democracy cannot be built from above.

In a multi-cultural society that politicians have also managed to ethnicise, there is great need for leadership, of the order of Gandhi, Nehru, Nyerere or Mandela. It is easier to foment ethnic hatred than to promote harmony—and the former is often seen as yielding higher political dividends. It is in this regard that our politicians have failed us all, miserably, and with great cost to society and the economy. Contemporary constitutions, characterised by extreme distrust of politicians and bureaucrats, provide some institutional rules to encourage the spirit of the constitution. And in a paradoxical way, the constitution is devoted in substantial measure to neutralising politicians, regulating their conduct, and removing certain critical and sensitive powers and functions from them. The powers of state institutions are prescribed with greater precision; the purposes for which powers may be exercised are specified; and rules are established to remove conflict of interests through codes of conduct and other mechanisms. Collective rights supplement individual rights, with greater likelihood of resort to enforcement mechanisms. A number of politically neutral, independent institutions are set up to exercise sensitive functions, insulating them from political influences and manipulation (such as electoral commissions, auditing mechanisms for government accounts, prosecutors, and public service commissions). Certain responsibilities (for which the government may not have much appetite) are given to independent commissions: human rights in general and those of vulnerable communities in particular, protection of the environment, prevention and control of corruption. There is a greater concern with enforceability: remedies are formulated; non-judicial bodies such as ombudspersons with enforcement powers supplement the judiciary; easier access to them and to the courts is provided.

Implementing a constitution is not about this or that provision, or even the totality of the constitution, important as these are. It is about the inculcation of a culture of respect for and discipline of the law, acceptance of rulings by the courts and other bodies authorised to interpret the law, giving effect to judicial decisions, acceptance of the limits on the government, respecting and promoting human and

collective rights, and the participation and empowering of the people. Ultimately the people have to be guardians of the constitution. To perform this role people have to understand the constitution and know their rights. They have to know how to use the machinery of the constitution and the law to hold public authorities accountable. They should be involved in the conduct of public affairs. They can also act as agents of accountability: for example by providing alternative budgets or analysing draft state budgets publishing annual assessments of the record of government and corporations regarding human rights, social justice, environment and natural resource policies, etc; and by providing alternative reports to regional and international human rights supervising bodies on the national record, undertaking constitutional litigation to prevent the state or private interests from breaching the constitution or law.

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COURTS AND WRITTEN CONSTITUTIONS: RESPECTING THE WRITTEN TEXT

Richard G Wilkins

Kenya is now debating a surpassingly important public issue: Will it adopt a new written Constitution. America, oddly enough, is also debating a related (and equally important) public issue: Can it keep a written Constitution? As Kenyan citizens and scholars move forward with their constitutional deliberations, it may be wise to keep in mind a caution from the current American experience – written constitutions must not only be adopted, they must be kept.

In *Lawrence v Texas*, the United States Supreme Court concluded that state legislatures could not criminalize homosexual sodomy.¹ Many (including Justice Scalia in dissent) noted that *Lawrence* raises a serious question regarding the future of marriage: Can marriage still be defined as the union of a man and a woman?² But *Lawrence* also raises another sober question: Does America still have a written Constitution?³

The answers are unknown.

As a result, and depending upon who is speaking, the President and the Senate are either preserving, ignoring, rewriting, or destroying the Constitution each time an individual is nominated or confirmed to the federal bench.⁴ The recent, politically based arguments made during the nomination and confirmation of Chief Justice John Roberts demonstrates that Members of the Senate – as well as the President and the American people – rather firmly believe that the “text” of the Constitution depends, in large measure, upon the personal views of the individuals who sit on the Nation’s highest court. Because of decisions like *Lawrence*⁵, the selection of federal judges (and particularly Supreme Court Justices) has become one of the Nation’s most contentious political issues.⁶ Even the process of judging

1 539 US 558 (2003).

2 539 US at 604 (Scalia, J, dissenting).

3 See Richard H Fallon, Jr, *Overcoming The Constitution: Implementing the Constitution* (Harvard University Press, 2001); see also Saikrishna B Prakash, Book Review, *Overcoming the Constitution: Implementing the Constitution*, 91 Geo L J 407 (2003) (“The constitutional law that emerges from [Supreme Court] opinions sometimes bears only the slightest resemblance to the Constitution itself”).

4 See, e.g., Roberts is chief; now who's next?, St. Petersburg Times, 30 September 2005 at 1A (Bush calls John Roberts a “faithful guardian of the Constitution”); A new era begins as Roberts takes oath Top justice OK'd despite Democrat holdouts; pivotal issues await, The Dallas Morning News, 30 September 2005, at 1A (wherein Senator Kennedy fears that Roberts will reverse the progress of equal protection gained over the last few decades).

5 539 US 558 (2003).

6 See, e.g., *Casey*, 505 US at 869 (plurality opinion of Justices O'Connor, Kennedy and Souter) (reasoning

has become politicized. In determining “what the Constitution means now,” individual Justices frankly admit they consider possible political reactions to their individual votes. For example, in *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833 (1992), the Supreme Court reaffirmed *Roe v Wade*, 410 US 113 (1973), not because *Roe* was correctly decided, but because three Justices concluded that their departure from the “central holding” of *Roe* might appear “political” and therefore undermine the Court’s “legitimacy”. James Madison and Alexander Hamilton (among others) assured the Founding Generation that federal judges would merely exercise “judgment,” not “will.”⁷ Time and experience, however, have not borne out their reassurance that the federal judiciary would be the “least dangerous branch.”⁸ Instead, the writings of such anti-Federalist essayists as Brutus (who was highly critical of the potentially unlimited power of the Article III courts to override state and federal legislatures⁹) provide a rather more accurate description of modern constitutional law, where “it is impossible ... to say” what “the principles are, which the courts will adopt,” except that they “may, and probably will, be very liberal ones” not confined to the “letter” of the Constitution.¹⁰ Brutus, in this instalment, argues that judicial power over the legislative branches will tend to expand leading (eventually) to the legislature accepting the Court’s (possibly) erroneous views regarding legislative powers:

It is to be observed, that the Supreme Court has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution, and independently of the legislature.

The latter can no more deprive the former of this right, than either of them, or both of them together, can take from the president, with the advice of the senate, the power of making treaties, or appointing ambassadors.

In determining these questions, the court must and will assume certain principles, from which they will reason, in forming their decisions. These

that a “decision to overrule *Roe*’s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy”).

7 The Federalist, number 78, available at

http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html (emphasis in the original).

8 The Federalist, number 78, available at

http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html.

9 Brutus, number 12, The Founders' Constitution, Volume 4, article 3, section 2, cl 1, doc 20, available at http://press-pubs.uchicago.edu/founders/documents/a3_2_1s20.html (The University of Chicago Press).

10 Brutus, no. 12, The Founders' Constitution, Volume 4, article 3, section 2, cl 1, doc 20, available at http://press-pubs.uchicago.edu/founders/documents/a3_2_1s20.html (The University of Chicago Press).

principles, whatever they may be, when they become fixed, by a course of decisions, will be adopted by the legislature, and will be the rule by which they will explain their own powers. Persistent malleability in the form and content of constitutional norms is not necessarily a virtue.

The Constitution was adopted by a Founding Generation which assumed (along with Madison and Hamilton) that, while the document would be subject to amendment and interpretation, the amendment process was vested where it belonged – in the hands of “the People”¹¹ – with the interpretative process safely left to judges who would apply (but not create) the law.¹² These assumptions are seriously out-of-place in a world where lawyers, law professors, politicians and even Supreme Court Justices are fixed upon the purported virtues of “a living Constitution.”¹³ At least three serious difficulties flaw the brief writer's version of the living Constitution. First, it misconceives the nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times. Second, the brief writer's version ignores the Supreme Court's disastrous experiences when in the past it embraced contemporary, fashionable notions of what a living Constitution should contain. Third, however socially desirable the goals sought to be advanced by the brief writer's version, advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society.

The Constitution is now so alive that its meaning changes with each new appointment to the federal bench.¹⁴

11 No one – and certainly not me – seriously contends that the constitutional principles established in 1789 are immune from change. The Founders did not bind future generations to a rigid and unchanging document. On the contrary, they established specific mechanisms for amending the document. See US Const. article V.

12 The anti-Federalists warned that the power of the judiciary would be “formidable, somewhat arbitrary and despotic” and would become “more severe and arbitrary, if not tempered and carefully guarded by the constitution, and by laws, from time to time.” See Federal Farmer number 15, 2 *The Complete Anti-Federalist* 8.185 (Herbert J Storing ed., 1981), available at http://press-pubs.uchicago.edu/founders/documents/a3_2_1s15.htm. Alexander Hamilton responded by assuring that the judges would exercise “judgment” rather than “will.” *The Federalist*, number 78, available at http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html (emphasis in the original).

13 As early as 1976 Justice Rehnquist expressed his concerns regarding the notion of a “living Constitution.” William H Rehnquist, *The Notion of a Living Constitution*, 54 *Tex L Rev* 693, 699 (1976). But compare *Van Orden v Perry*, 125 S Ct 2854, 2888-89 (2005).

14 The current Constitution is so malleable that one can legitimately question whether it furthers such important values as stability and certainty. As Justice Scalia noted in the opening paragraphs of his dissent in *Lawrence*:

“Liberty finds no refuge in a jurisprudence of doubt.” *Planned Parenthood of South eastern Pa v Casey*, 505 US 833, 844 (1992). That was the Court's sententious response, barely more than a decade ago, to

How did America's fundamental political charter become so vaporous that the Nation's entire political structure trembles each time a new Justice is named to the Supreme Court?¹⁵ The genealogy of *Lawrence* tells the tale.

Lawrence relies upon a constitutional right not set out in the actual language of the Bill of Rights and the Fourteenth Amendment – the increasingly ubiquitous modern “right of privacy”.¹⁶ This right was first announced by the Supreme Court in its 1965 decision in *Griswold v Connecticut*.¹⁷ The case involved the State of Connecticut's legislative decision to regulate the use of condoms by married couples – a law that in the mid-1960's, was quaint and anachronistic.

But rather than wait for the ordinary processes of democratic debate to adjust state policy, the Supreme Court assumed the task of freeing the electorate of Connecticut (and America in general) from a law, the dissenting Justices called “silly.”¹⁸ The Court emancipated the country from the bonds of silliness by noting that the Connecticut law regulated the marital relationship, a union between a man and a woman, that was – in the words of the Court – “intimate to the degree of being sacred.”¹⁹ This sacred relationship, the Court concluded, must be supported by a “right to privacy,” even though the Constitution nowhere mentions the right.²⁰

those seeking to overrule *Roe v Wade*, 410 US 113 (1973). The Court's response today, to those who have engaged in a 17-year crusade to overrule *Bowers v Hardwick*, 478 US 186 (1986), is very different. The need for stability and certainty presents no barrier.

539 US at 586 (Scalia, J, dissenting). The normative content of “living” constitutional law – in particular the right to privacy at issue in *Lawrence* – can expand, erode, accrete or metastasize (depending upon whether one wants to describe the change in positive or negative terms) within a few decades. Compare *Griswold v Connecticut*, 381 US 479, 486 (1965) (erecting the constitutional right to privacy upon the “sacred” union of a man and a woman in marriage) with *Lawrence*, 539 US at 574, 578–79 (finding that privacy is not based upon marriage; rather the right rests upon an individual entitlement to determine one's “own concept of existence, of meaning, of the universe, and of the mystery of human life”).

15 See generally Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004); Larry Alexander and Lawrence B Solum, Book Review, ‘Popular? Constitutionalism? The People Themselves: Popular Constitutionalism and Judicial Review’, 118 *Harv L Rev* 1594 (2005) (synopsis of book explains that the Justices of the Supreme Court have become “the ultimate and final expositor of constitutional meaning”).

16 See generally 539 US 558. “Privacy” has become one of the key concerns when potential Supreme Court nominees are considered, as evidenced during the John Roberts confirmation process. I Come Before the Committee With No Agenda. I Have No Platform, *NY Times*, 13 September 2005, at A28 (Senators Specter and Feinstein announced their specific intent to address privacy rights at the outset of the meetings).

17 381 US 479 (1965).

18 381 US at 527 (Stewart and Black, JJ, dissenting).

19 381 US at 486.

20 381 US at 486.

The Court did not consider whether its new analysis was consistent with the long-standing history and traditions of the American people. It could not undertake such an analysis because any careful review of actual historical practices would have shown that – however out-of-touch Connecticut’s law appeared in the middle of the 1960’s sexual revolution – states throughout the nation had regulated the sexual conduct of married and unmarried citizens by means of adultery, incest and fornication laws from the dawn of the Republic. The policies animating these laws (as noted by the concurring opinion in *Griswold*) may have seemed less “silly” in 1965 than a prohibition on condom usage,²¹ but adultery, incest and fornication laws are rather hard to distinguish on constitutional grounds from Connecticut’s regulation of marital fecundity.²² The concurring opinion noted that Connecticut’s policy was essentially a “birth-control law” because “of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception.” The concurring Justices, however, ignored the fact that state condom-use policies which encourage child bearing by married couples, like state adultery laws which encourage sexual fidelity by married couples, both express political and moral judgments regarding the social value and utility of certain sexual practices within marriage; political and moral judgments that are distinguishable from each other only as a matter of degree. Which regulation, a rule prohibiting a married couple’s use of condoms or a rule prohibiting any expression of extra-marital sexuality, “intrudes” more “significantly” on the “sexual rights” of the marital partners? This inquiry could be answered in various ways by various analysts. Nevertheless, while the concurring Justices found Connecticut’s interest in prohibiting one method of birth control unconstitutional, they had no difficulty whatsoever in announcing that the constitutionality of adultery statutes was “beyond doubt.” As the dissenting Justices pointed out, nothing in the text of the Constitution invalidated Connecticut’s law simply because it was “unreasonable” or “unwise.”²³ As Justice Black’s extensive dissent, joined by Justice Stewart, emphasized:

21 See, e.g., Jeremy D Weinstein, Note, ‘Adultery, Law, and the State: A History’, 38 *Hastings L J* 195 (1986) (giving a history of the adultery statutes beginning with “barbarian times.”); Jennifer A Herold, Review Note, ‘A Breach of Vows But Not Criminal: Does *Lawrence v Texas* Invalidate Utah’s Statute Criminalizing Adultery?’, 7 *JL Fam Stud* 253 (2005) (This article begins with a reference to the punishment enforced by the Commonwealth of Massachusetts for adultery – death by hanging – and also discusses the history of the Utah adultery statute); Note, ‘Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extra-marital Sex’, 104 *Harv L Rev* 1660 (1991) (stating that in 1991 more than 25% of the states still had fornication statutes).

22 381 US at 498 (Goldberg and Brennan, JJ, and Warren, CJ, concurring).

23 381 US at 520–521 (Black and Stewart, JJ, dissenting).

There is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

Because neither the words of the Constitution nor the specific history and traditions of the American people invalidated Connecticut's law, the Court was required to fashion a new analysis that would set aside the state's condom policy.²⁴ Accordingly, the Court announced that the "specific guarantees in the Bill of Rights have penumbras" (or partial shadows)²⁵ that give the actual wording of the Constitution "life and substance."²⁶ Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. "The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth

24 While the result in *Griswold* is rarely criticized, the legal soundness of the *Griswold* analysis has been questioned. See, e.g., Michael A Woronoff, Note, 'Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy', 18 U Mich. JL Reform 195, 198-201 (1984) (noting that even though the outcome of a case may be correct under *Griswold*, the logic of the case "remains unconvincing.").

25 "Penumbra: (1) A partial shadow, as in an eclipse, between regions of complete shadow and complete illumination," Dictionary.com, <http://dictionary.reference.com/search?q=penumbra> (last visited 13 October 2005).

26 381 US at 484:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v Ullman*, 367 US 497, 516-522 (dissenting opinion).

Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”.

In real life, the substance of shadows (and particularly partial shadows) is questionable and they result from the lack, not the presence, of light. Nevertheless, relying upon dimness, the sacred nature of marriage and the talismanic word privacy, the Court walked away from the specific guarantees of the United States Constitution as well as the history, experience and traditions of the American people.²⁷ The judicial journey begun in *Griswold* has now brought into constitutional doubt the “sacred” union of “marriage” upon which *Griswold* itself rests.²⁸ As a result, Americans must act – not only to protect the union lauded in *Griswold* – but to reinstate what Chief Justice John Marshall in 1803 called “the greatest improvement on political institutions” achieved in America: the establishment of “a written constitution”.²⁹

Legal scholars applauded the rather startling analysis of *Griswold*. They wrote elaborate justifications for the use of “privacy analysis” to abolish legislative anachronisms with a minimum of fuss and bother.³⁰ They paid little heed to Justice Black’s warning that *Griswold* had dramatically altered the meaning of the Bill of Rights by “substitut[ing] for the crucial word or words” of various constitutional guarantees “another word” – privacy – that could be “more or less flexible and more or less restricted in meaning” than the Constitution’s original text.³¹ They similarly ignored the grave potential that *Griswold*’s broad notion of a “living

27 See Woronoff, note 24, above, at 198–201.

28 *Griswold*, 381 US at 486 (noting that “[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred”).

29 *Marbury v Madison*, 5 US 137, 178 (1803).

30 See, e.g., Jed Rubenfeld, ‘The Right of Privacy’, 102 Harv L Rev 737, 740–52 (1989) (setting forth the “genealogy” of “privacy” and praising *Griswold* as providing the foundation for constitutional recognition of “personhood”). For an elaborate, book-length defense of *Griswold* and related cases, see Bruce Ackerman, *We The People : Foundations*, 88, 140–59 (Cambridge: Belknap Press, 1991) (praising *Griswold* as an outstanding example of what he calls a “multigenerational synthesis” of new “constitutional moments” with “pre-existing constitutional values”). Even generally “conservative” legal scholars – who candidly note the frailty of its constitutional analysis – generally tend to support the outcome of *Griswold*. See, e.g., Jane E Larson, ‘The New Home Economics’, 10 Constitutional Commentary 443, 449 and n 20 (1993) (reviewing Richard G Posner, *Sex and Reason* (Cambridge, MA: Harvard University Press, 1993) (noting that although Posner concludes that “*Griswold* and its successors probably have no legal-doctrinal ground in the Constitution,” he nevertheless agrees with the outcome of *Griswold* and many subsequent cases on the ground that certain regulations of sexual conduct are “so offensive, oppressive, [and] probably undemocratic” as to warrant a finding of constitutional invalidity).

31 *Griswold*, 381 US at 509 (Black and Stewart, JJ, dissenting).

Constitution” could threaten the very existence of the “written Constitution” lauded by John Marshall.³² As Justice Black explained in his *Griswold* dissent:

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old fashioned I must add it is good enough for me.

In the rush to support the purportedly enlightened approach of *Griswold*, too many Americans – including citizens, lobbyists, lawyers, law professors and judges – seemed to forget that constitutional law involves much more than ensuring “proper” results in particular (even silly) cases. Those who drafted the document viewed the Constitution’s distribution of decision making power between and among the various branches of state and federal government as its most important role; the very foundation of American liberty.³³ Due to the fact that various results may be “proper” at different times and in different circumstances, the constitutional distribution of decision making power in 1789 was – and remains today – profoundly important.³⁴

The Constitution was not drafted to resolve every difficult, troublesome and/or controversial issue of public policy.³⁵ This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional ‘principle’, and that this Court should ‘take the lead’ in promoting reform when other branches

32 See, e.g., *Marbury*, 5 US at 178.

381 US at 522 (Black and Stewart, JJ, dissenting).

33 See, e.g., *The Federalist*, number 22 (Alexander Hamilton), number 51 (James Madison or Alexander Hamilton), number 62 (James Madison or Alexander Hamilton), number 73 (Alexander Hamilton) (all discussing the importance of separation of powers as the primary security for the freedom and liberty of the American people), available at http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html.

34 See, e.g., *Saenz v Roe*, 526 US 489, 504, n 17 (1999) (citing *US Term Limits, Inc v Thornton*, 514 US 779, 838 (1995)) (“The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”).

35 See, e.g., *Reynolds v Sims*, 377 US 533, 624–25 (1964) (Harlan, J dissenting). Justice Harlan criticizes what he calls a “current mistaken view of the Constitution and the constitutional function of this Court”: *Id.* [emphasis mine].

of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

In the areas where it speaks rather clearly, the Constitution leaves final decision making authority with the judiciary.³⁶ If state or federal governments exercise power in a manner that encroaches upon core constitutional values (as set out in constitutional text construed in light of the actual practices, experience and traditions of the American people)³⁷, the judiciary must act to protect those values.³⁸ But the drafters of the American Constitution believed this judicial role would be exceptional and rarely invoked.³⁹ asserting that the judicial invalidation of a legislative act would be quite rare since “it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution” to strike down “legislative invasions” of the Constitution “instigated by the major voice of the community”). As the Federalist papers proclaim, the judiciary is the “least dangerous” branch because judges do not create policy but merely exercise “judgment.”⁴⁰ Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to

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- 36 The Federalist, number 78, available at http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html (Hamilton) (emphasizing that if the legislature were to pass a law that were contrary to one of the clauses of the constitution then it would remain to the courts of justice “whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing”).
- 37 See, e.g., *Washington v Glucksberg*, 521 US 702, 710 (1997) (Court notes that it “begin[s], as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices”).
- 38 The Federalist, number 78, available at http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html.
- 39 The Federalist, number 78.
- 40 As The Federalist, number 78, explains:
The Federalist, number 78 [emphasis mine].

the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” The really difficult questions, the Founders thought, were left to the people.

The Supreme Court has departed from the decision making structure established by the Founders on more than one occasion.⁴¹

All of the Court’s departures from constitutional text can be explained as judicial attempts to keep the Constitution in “tune with the times.” History, however, demonstrates that keeping the Constitution “in tune with the times” is a questionable enterprise at best.

Prior to *Griswold* and *Lawrence*, the most recent period of judicial excess was ended (at least in part) by President Roosevelt’s famous threat to “pack the Court” in 1937.⁴² From the late 1890’s to the mid-1930s, the Justices of the Supreme Court invalidated various state and federal legislative judgments on the ground that they unduly interfered with the “liberty” of American citizens.⁴³ Back then the unwritten freedom that the Court enforced was not privacy, but economic liberty.

In *Lochner v New York*,⁴⁴ for example, the Court struck down a law establishing a 10-hour workday for bakery employees who laboured near hot and dangerous wood- and gas-fired ovens. Why was this seemingly sensible regulation unconstitutional? Because, by setting a limit on the number of hours an employee could work, New York had unduly interfered with the right of free men to

41 See, e.g., *Dred Scott v Sandford*, 60 US 393 (1856); *Plessy v Ferguson*, 163 US 537 (1896). *Dred Scott*, 60 S Ct at 450.

42 See Mary Murphy Schroeder, “The Ninth Circuit and Judicial Independence: It Can’t Be Politics as Usual”, 37 *Ariz. St L J* 1, 4-5 (2005) (giving a short story of the court packing plan and how Roosevelt did not want to be held to the “horse and buggy days” of the Court’s interpretation of the Commerce Clause).

43 *Allgeyer v State of Louisiana*, 165 US 578 (1897); *Lochner v New York*, 198 US 45 (1905); *St Louis Cotton Compress Company v State of Arkansas*, 260 US 346 (1922); *Adkins v Children’s Hospital*, 261 US 525 (1923).

44 198 US 45, 64-65 (1905).

negotiate their own terms of employment.⁴⁵ In the 1920s, the shadows of the Constitution protected a rather unusual constitutional right indeed: the “right” of New York bakers to work themselves to death.⁴⁶

By 1936, cases like *Lochner* threatened to invalidate the Roosevelt Administration’s efforts to ease the economic suffering caused by the Great Depression.⁴⁷ Various provisions of the New Deal interfered with economic rights highly valued by the Justices.⁴⁸ After the Supreme Court invalidated parts of the National Industrial Recovery Act⁴⁹ and the Agricultural Adjustment Act⁵⁰ in 1935 and 1936, President Roosevelt went on the offensive. Following his election to a second term, in one of his famous “fireside chats,” he threatened in 1937 to appoint a new Supreme Court Justice for each one of the “nine old men” on the Supreme Court over the age of 70.⁵¹ These Justices, the President declared, were “out of touch” with the needs of ordinary Americans, the economic realities of the day, and even the intentions of the Founders.⁵² Such a strong message from a popular president prompted Congress to hold hearings on the proposal, but before any changes were made, the Supreme Court abandoned its enforcement of non-enumerated constitutional liberties and the President abandoned his plan to pack the Court.

Between December 1936 and the end of the first quarter of 1937, the Supreme Court made an abrupt about-turn. On the heels of President Roosevelt’s challenge, the Court began to implicitly condemn its prior decisions as unwarranted judicial departures from the text of the Constitution.⁵³ Rather than invalidating legislation

45 198 US 45, 64–65 at 57.

46 *Lochner* is generally considered the great “progenitor” of the modern substantive due process cases discussed below. See David E. Bernstein, “*Lochner* Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism,” 92 Geo LJ 1, 13 (2003).

47 See, e.g., William E Leuchtenburg, ‘When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis’, 108 Yale LJ 2077, 2079–80, 2082–87 (citing various cases and some of Roosevelt’s reactions to them leading up to the introduction of his court-packing plan).

48 See, e.g., *Schechter Poultry Corp v United States*, 295 US 495 (1935) (striking down the NIRA); *United States v Butler*, 297 US 1 (1936) (striking down the AAA); *Carter v Carter Coal Co* 298 US 238 (1936) (striking down the “little NRA”); *Ashton v Cameron County Water Improvement District number 1*, 298 US 513 (1936) (striking down the MBA).

49 See *Schechter Poultry*, 295 U.S. 495; *Panama Refining Company v Ryan*, 293 US 388 (1935).

50 See *Butler*, 297 US 1.

51 Richard G Wilkins, ‘Fireside Chat on the Reorganization of the Judiciary,’ 9 March 1937, at <http://www.fdrlibrary.marist.edu/030937.html>. [Accessed 3 October 2005].

52 Richard G Wilkins, ‘Fireside Chat on the Reorganization of the Judiciary,’

53 See, e.g., *West Coast Hotel Co v Parrish*, 300 US 379 (1937) (overruling *Adkins v Children’s Hospital*, 261 US 525 (1923) by upholding minimum wage legislation); National Labour Relations Board (NLRB).

because it restricted the unenumerated economic liberties of American citizens, the Court wrote regarding the obligation, duty and privilege of free men and women to govern themselves by debating and deciding difficult questions of social and economic policy.⁵⁴ The Court seemingly recalled (and conducted its business pursuant to) Chief Justice John Marshall's famous dictum in *Marbury v Madison*⁵⁵ that "the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."⁵⁶

Throughout the early 1960's, the Court regularly opined regarding the dangers of enforcing judicially preferred policies, in disregard of the text, structure and history of the American Constitution.⁵⁷ Unfortunately, *Griswold* (and subsequent privacy cases) paid little heed. The contraception law in *Griswold* was, as Justice Stewart observed, "uncommonly silly" and outdated.⁵⁸ However proper the result in *Griswold* seemed (and still seems today), the analysis launched by the case encouraged social activists, lawyers, law professors and judges to increasingly ignore that Article III does not establish the federal courts as the perpetual censor of unreasonable legislation or as the ultimate arbiter of all divisive moral controversies.

Most legislative and executive decisions are not controlled (and cannot be controlled) by the presciently precise language of the Constitution.⁵⁹ If the "correct" answers to pressing questions are fairly debatable, those questions must be – indeed, should only be – resolved by legislative action. The "correct" answers to such questions as the appropriate level of welfare assistance,⁶⁰ the purity of the

Jones and Laughlin Steel Corp, 301 US 1 (1937) (upholding the constitutionality of the Wagner Act).

54 See Jones and Laughlin, 301 US at 30 (discussing the presumption of constitutionality afforded legislative enactments).

55 5 US 137, 178 (1803).

56 5 US 137at 179–180 (emphasis in original).

57 See, e.g., *Ferguson v Skrupa*, 372 US 726, 729–30 (1963) (stating that "intrusion by the judiciary into the realm of legislative value judgments" characterized a number of past decisions, but that "[t]he doctrine ... that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded").

58 See *Griswold*, 381 US at 528–31 (Stewart and Black, JJ, dissenting).

59 381 US at 531 ("it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases 'agreeably to the Constitution and laws of the United States.' It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books").

60 See, e.g., *Dandridge v Williams*, 397 US 471 (1970) (Court refuses review state-provided benefits under the Due Process and Equal Protection Clauses).

nation's air,⁶¹ and the sexual conduct of its citizens⁶² are fairly debatable and, therefore, left for resolution by state and national legislatures.⁶³

This is particularly true when government action involves moral questions. And although it seems almost prehistoric to note that government action implicates moral issues, questions of morality abound in government decision making.⁶⁴ The all-too-common contention that “government has no business regulating morality” makes a good sound bite, but not much sense. Governmental decisions always involve striking a balance between competing moral values. To whom should society pay welfare benefits? How much? When? These and thousands of other questions addressed daily by government necessarily will be resolved in favour of one moral view or another. The “right to privacy”, enunciated in *Griswold* and expanded in cases thereafter,⁶⁵ has rendered the American legal system increasingly oblivious to the reality that debatable moral and ethical questions are poor candidates for judicial resolution.

Following *Griswold*, the privacy right supposedly founded on the “sacred” institution of “marriage” was extended to unmarried couples,⁶⁶ a substantive result that (again) sparked little disagreement.⁶⁷ But the Court’s expansion of privacy to include abortion in *Roe v Wade*⁶⁸ revealed how easy it is for judges to stumble when walking through constitutional shadows. *Roe* starkly revealed the kinds of questions the Court (rather than the people) would decide under the penumbral “right to privacy”.

61 See, e.g. *Hancock v Train*, 426 US 167 (1976) (construing respective rights and duties of state and federal governments in implementing the Clean Air Act).

62 *Bowers v Hardwick*, 478 US 186, 196 (1986), rev’d, *Lawrence v Texas*, 539 US 558 (2003).

63 See generally, Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

64 See Dallin H Oaks (former Chicago Law Professor, Justice on the Utah Supreme Court, and Executive Director of the American Bar Foundation), *Religious Values and Public Policy*, *Ensign*, October 1992, at 60 (address given 29 February 1992 to the Brigham Young University Management Society, Washington, D.C. stating that there is scarcely a piece of legislation that is not founded on some conception of morality; the issue is merely “whose morality and what legislation.” See also *Bowers*, 478 US at 196 (“The law ...is constantly based on notions of morality , and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed”).

65 For a good discussion of the development of the privacy right as it relates to sexual issues, see Donald H J Hermann, ‘Pulling the Fig Leaf off the Right to Privacy: Sex and the Constitution’, 54 *DePaul L R* 909 (2005).

66 *Eisenstadt v Baird*, 405 US 438, 454–55 (1972).

67 See John Hart Ely, *The Wages of Crying Wolf*, 82 *Yale LJ* 920 (1973) (explaining that the results of *Griswold* and subsequent cases were so popular that criticisms were like crying “wolf;” such that when the Court abandoned all pretence of judicial restraint with *Roe v Wade*, few listened to the serious separation of powers issues raised by the case).

68 410 US 113 (1973).

The Roe Court took pains to explain that abortion was particularly well suited for judicial resolution precisely because it involved (among other things⁶⁹) “the difficult question of when life begins;” a question upon which the Court need not “speculate as to the answer”.⁷⁰ (“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer”). But, as despite this disclaimer, the Court announced that a woman could terminate the life of an unborn child for any (or no) reason at any time prior to the point when the child could live outside the womb.⁷¹ By providing a speculative response (“life,” or at least legally cognizable “life,” begins at “viability”⁷²) to a question the Court purportedly did not need to “answer,”⁷³ the unusual contours of the a-constitutional right of privacy at last drew significant attention.⁷⁴ Philosophers, ethicists and many Americans recognized that the utilitarian reasoning of Roe raised a host of disconcerting questions.⁷⁵ The willingness of the Court in Roe to balance the value of unborn human life against a woman’s claim to privacy, led inevitably to claims that the Constitution also protects a right to assisted suicide – or “active” euthanasia, a position – so far – rejected by the Court. But Roe raises other ethical issues as well for the first time since Griswold, many Americans paused. It seemed the Court might, too.

69 410 US at 116-17 (“We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to colour one's thinking and conclusions about abortion.”).

70 410 US at 159.

71 410 US at 163-64, 166.

72 410 US at 163-64, 166.

73 410 US at 159.

74 See, e.g., John Hart Ely, *The Wages of Crying Wolf*, 82 Yale LJ 920 (1973) (discussing Roe's dramatic departure from established standards of judicial review). The debate surrounding Roe is too extensive to chronicle here, but for a good general discussion of the history and legal theory see *NEH Hull and Peter Charles Hoffer, Roe v Wade: The Abortion Rights Controversy in American History* (2001); for a less scholarly, but more accessible summary, see also http://en.wikipedia.org/wiki/Roe_v._Wade#Controversy_over_Roe.

75 *Washington v Glucksberg*, 521 US 702 (1997) (rejecting assertion that the right to assisted suicide is protected by the Due Process and Equal Protection Clauses).. For a recent example, see Larry I. Palmer, *Genetic Health and Eugenics Precedents: A Voice of Caution*, 30 Fla St U LRev 237, 255 and n 89 (2002) (explaining that “without a woman's legal right to have an abortion ... genetic liability claims would not be theoretically possible”).

Roe forced America (and the Court) to confront whether the Constitution, in fact, mandates judicial resolution of social controversies precisely because they are moral, divisive and difficult. The legal academy that had nurtured privacy analysis⁷⁶ and warmly welcomed *Griswold*⁷⁷ now rushed to rewrite and re-explain the Supreme Court's astonishing decision. Thousands of pages in the law reviews were dedicated to sophisticated (and often incomprehensible and contradictory) justifications for Roe's elimination of democratic debate and decision making at the very moment they were needed most.⁷⁸ These obviously *post hoc* apologetics embarrassed the Court and for many years the Court was hesitant to lengthen the shadows of *Griswold*.

Indeed, in the 1986 opinion in *Bowers v Hardwick*,⁷⁹ the Court avoided the right to privacy altogether and looked (at long last) to the language of the Constitution and the teachings of long-standing American traditions and history. Because there is nothing in the language of the Constitution that directly addresses the question, *Bowers* concluded that states could decide whether or not to regulate homosexual conduct, even if the chosen course seemed prudish, silly or outdated.⁸⁰ The right to privacy did not dictate a contrary result, the Court noted, because human sexuality involves debatable questions of morality that have been regulated for centuries – and might warrant regulation today. The *Bowers* Court also noted that homosexual behaviour, unlike that involved in *Griswold* and *Roe*, “bear[s] [no] resemblance” to “family relationships”, “marriage”, or “procreation”.⁸¹

Even *Roe* underwent a transformation during this momentary waning of privacy analysis. In the 1992 decision of *Planned Parenthood v Casey*,⁸² the Supreme Court pointedly did not reaffirm the reasoning of *Roe v Wade*. As the dissenting Justices noted, the controlling opinion for the Court could not “bring itself to say that *Roe* was correct as an original matter.”⁸³ Caught in a difficult gap between

76 The legal academia proposed the right to privacy nearly eight decades prior to *Griswold*. See Louis D Brandeis and Samuel D Warren, *The Right to Privacy*, 4 Harv L R 193 (1890). For a good discussion on the development of the privacy doctrine generally, see Amy Peikoff, *No Corn on This Cobb: Why Reductionists Should be all Ears for Pavesich*, 42 Brandeis L J 751 (2004).

77 See authority at note 30, above.

78 See Seth F Kreimer, ‘Does Pro-Choice Mean Pro-Kevorkian? An Essay on *Roe*, *Casey*, and the Right to Die’, 44 Am U L Rev 803, 808 and n 16 (1995) (criticizing *Roe* and citing to numerous articles attempting to provide alternative rationales for the decision). See also authority at notes 74–76, above.

79 478 US 186.

80 478 US at 192–96.

81 478 US at 190.

82 505 US 833 (1992).

83 505 US at 953.

Roe's faulty logic and its refusal to reject Roe's result, the Court resorted to *stare decisis*—a doctrine which provides that a legal question, once decided, remains decided. Roe may have gotten it wrong, the Court announced, but right or wrong the decision would stand.⁸⁴ It looked like the right to privacy had itself become penumbral.

But, at least in constitutional law if not in real life, never underestimate the compelling substance of partial and incomplete shadows. The decision in *Lawrence v Texas*⁸⁵ demonstrates that the Court has recovered from the bout of judicial modesty it suffered between Bowers and Casey. The penumbra of privacy is back.

Roe did not get it wrong after all. Rather, it is Bowers (and the hesitant approach of Casey) that are constitutionally suspect. Bowers, in fact, is reversed.⁸⁶ Lawrence declares that the reasoning of Bowers — that family, marriage and procreation are sturdy enough social interests to overcome the judicially created right to privacy — is fatally flawed. According to the Court, Griswold was wrong too. Forget all that talk in 1965 about the “sacred” nature of the “marital union;” privacy (following the Court's further consideration) has nothing at all to do with marriage, procreation, or the bearing and rearing of children.⁸⁷ Instead, privacy vests sexual partners with a constitutional entitlement to determine their “own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁸⁸ And under this “concept of existence” and “mystery of human life” clause, government may not “demean” consenting adult sexual behaviour.⁸⁹

Accordingly, society may have no business making any distinction between a marital union of a man and a woman and a sexual partnership between two men, two women or (why not?) three men and four women.⁹⁰ If marriage is “sacred” (as Griswold declared⁹¹) can society “demean” other sexual relationships under Lawrence by suggesting they are not? Furthermore, can a state even require sexual fidelity between spouses? If it does, doesn't that “demean” individuals whose “meaning of the universe” includes “open marriage”? Probably. Thus, marriage

84 505 US at 870–71.

85 539 US 558 (2003).

86 539 US at 578.

87 539 US at 574, 578–79.

88 539 US at 574.

89 539 US at 578.

90 Robert P George, ‘What's Sex Got to do With It? Marriage, Morality, and Rationality’, 49 Am J Juris. 63, n 63 (2004).

91 Griswold, 381 US at 486.

may no longer mean a man and a woman, two people, sexual exclusivity, or exclude partnerships between close relatives. Because human reproduction is impossible between partners in same-sex relationships, consanguinity rules (which generally prohibit marriage between close relatives to guard against, among other things, genetic concerns related to reproduction) would seemingly pose no obstacle to marriages between two sisters, two brothers, a mother and her daughter or a father and his son

Thus, through the questionable logic of legal reasoning purposely freed from the tethers of the actual language of the United States Constitution and American tradition, a purported right which sprang from the centuries' old social institution called marriage may soon become that institution's very undoing.⁹² No wonder Justice Scalia notes that Lawrence "leaves on pretty shaky grounds state laws limiting marriage to opposite sex couples."⁹³ In addition to Lawrence, decisions from various state courts demonstrate just how "shaky" judicial action has rendered established laws related to marriage. Although decisions from only two states are final (Vermont and Massachusetts), judicial decisions in favour of legalizing same-sex marriage or marriage-equivalent unions have come (in chronological order) from Hawaii, Alaska, Vermont, Massachusetts, Oregon, Washington, New York and California.

92 The concluding paragraph of *Griswold* adulates marriage:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold, 381 US at 486.

93 *Lawrence v Texas*, 539 US 558, 601 (Scalia, J, dissenting). *Hawaii: Baehr v Lewin*, 852 P.2d 44, 67 (Haw. 1993); *Baehr v Mücke*, 196 WL 694235 (Haw Cir Ct 1996); *Alaska: Brase v Bureau of Vital Statistics*, number 3AN-95-6562, 1998 WL 88743 at 6 (Alaska Super Ct, 27 February 1998); Vermont: *Baker v State*, 744 A 2d 864 (Vt 1999); *Massachusetts: Goodridge v Department of Public Health*, 798 NE 2d 941, 943, 959 (Mass. 2003); *In Re Opinion of the Justices to the Senate*, 802 NE 2d 565, 569-71 (Mass. 2004); *Oregon: Li v State*, 2004 WL 1258167 (Or Cir 20 April 2004), rev'd, 110 P 3d 91 (Ore. 2005); *Washington: Andersen v King County*, 2004 WL 1738447 *3,4,11 (Wash. Super. 2004); *Castle v State*, 2004 WL 1985215, *11 (Wash. Super. 7 September 2004); *New York: Hernandez v Robles*, 794 NYS 2d 579 (NY Sup, 4 February 2005);

California: In Re Coordination Proceeding, Special Title [Rule 1550(c)] Marriage Cases, number 4365, 2005 WL 583129 (Cal Super Ct San Fran., 14 March 2005).

Following *Lawrence*, the Massachusetts Supreme Judicial Court⁹⁴ relied upon the reasoning of the Supreme Court's opinion to hold that the Massachusetts Constitution, although nowhere discussing or addressing the matter in its actual text, demands official recognition of same-sex marriage.⁹⁵ In reaction to *Lawrence* and the Massachusetts decisions, voters in 11 states last November amended their state constitutions to define marriage as the union of a man and a woman.⁹⁶ This unusual action by states ranging in political views from Mississippi to Utah to Oregon does more than prevent state courts from invoking privacy (or other judicial innovations) to redefine marriage – it also demonstrates the growing unease of Americans with expanding state and federal judicial power. Americans are becoming aware that, over the past 40 years, the judiciary's increasing disregard of constitutional strictures has deprived them of the ability to answer many of the political questions that affect them most. Marriage is just one of the more recent questions the judges are about to take from the hands of American voters.

As a result, more than marriage is on shaky ground. So is America's "greatest improvement on political institutions:" the idea of "a written constitution."⁹⁷

The reasoning in *Lawrence* erodes democratic control of debatable – and unquestionably difficult – issues of moral concern. By substituting a potentially far-reaching (and as yet undefined) "concept of existence, of meaning, of the universe, and of the mystery of human life" test⁹⁸ for the actual text of the Constitution, *Lawrence* seriously erodes the ability of American citizens to engage in open and honest political discussions regarding the outcome of an unknown range of fairly debatable moral controversies. Such questions – ranging from cloning and

94 The Massachusetts judicial system is now hearing a law suit that seeks a judgment that same-sex couples from other states can marry in the Commonwealth, potentially making Massachusetts "America's gay marriage capital." See Jason Szep, 'Mass. Court Hears Out-of-State Gay Rights Challenge', Reuters, Thurs. 6 October 2005.

At http://today.reuters.com/news/newsArticle.aspx?type=politicsNews&storyID=2005-10-06T222645Z_01_YUE680772_RTRUKOC_0_US-RIGHTS-GAYS.xml. [Please indicate the date when the site was last consulted].

95 *Goodridge v Dept of Public Health*, 798 N.E.2d 941, 973-74 (Mass 2003).

96 Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah all passed state constitutional amendments in 2004 defining marriage as between a man and a woman.

See <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/>. Accessed 4 October 2005.

97 *Marbury*, 5 US at 178.

98 *Lawrence*, 539 US at 574.

biomedical research to euthanasia⁹⁹ and children's rights¹⁰⁰ – involve some of the most pressing issues of modern life.

After *Lawrence*, which democratic judgments in these areas will survive the new (and apparently individualistic and idiosyncratic) “concept of existence” and “mystery of human life” test? Who can tell? Will the long-standing definition of marriage as the union of a man and a woman withstand judicial analysis? No one knows – although the Massachusetts Supreme Judicial Court's invocation of *Lawrence* suggests that the answer is “No”.¹⁰¹

Throughout America, ordinary citizens, lawyers, law professors, legislators and judges obviously disagree regarding the meaning of marriage. The existence of this deep disagreement, however, demands that the people be allowed to vote on a Federal Marriage Amendment to express their constitutional views regarding the meaning, content and social role of Griswold's sacred relationship.¹⁰²

Marriage is an essential and long-standing social institution with profound importance for the social health of American society.¹⁰³ Furthermore, while it is unclear what impact judicial redefinition of marriage might have on American society, there is surprisingly general agreement that further debilitation of marriage in America would be dangerous indeed.¹⁰⁴ The meaning and social role of marriage is too important – and the current health of the institution too fragile¹⁰⁵ – for its

99 See, e.g., *Washington v Glucksberg*, 521 US 702 (1997) (rejecting the claim that the Due Process Clause establishes a constitutional right to active euthanasia; however, the Court's analysis rests upon a textual and historical examination of the meaning of the clause – the interpretative approach rejected in *Lawrence*).

100 See, e.g., *Roper v Simmons*, 125 S Ct 1183, 1198–1200 (2005) (Supreme Court ascertains the content of the Eighth Amendment by relying, in part, upon the practice of foreign nations and the terms of an international treaty never ratified by the Senate). Compare *id.* at 1217 (Scalia and Thomas, JJ, dissenting) (asserting that the Court's holding rests, not upon the language of the Eighth Amendment or the history of its implementation by the American states, but upon the majority's notions regarding “evolving standards of decency” derived in significant part from “the views of foreign courts and legislatures”).

101 Goodridge, 798 NE 2d at 973–74.

102 Griswold, 381 US at 486.

103 Stephen P Martin, ‘Why Marriage Matters: Twenty Six Conclusions from the Social Sciences,’ (2 ed), The (New York: Institute for American Values, 2005).

104 Stephen P Martin, pages 6–7 (noting that, since the publication of the First Edition of the Study, a careful consideration of all available social scientific studies support five new findings; among these are findings that “[a]n emerging line of research indicates that marriage benefits poor Americans, and Americans from disadvantaged backgrounds, even though these Americans are now less likely to get and stay married;” “[m]arriage seems to be particularly important in civilizing men, turning their attention away from dangerous, antisocial, or self-centered activities and towards the needs of a family;” and “[b]eyond its well-known contributions to adult health, marriage influences the biological functioning of adults and children in ways that can have important social consequences”).

105 See *id.* (all 26 findings).

meaning and future vitality to be determined by the oligarchic votes of as few as five Members of the Supreme Court. As Abraham Lincoln warned in his First Inaugural Address: “if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation ..., the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”¹⁰⁶

Accordingly, at the end of the day, Lawrence raises a fundamental question regarding the constitutional process for defining marriage in America. The pressing issue is whether the People or the Court should decide the outcome of a debatable, divisive, difficult – even transcendent – question of social morality. The Supreme Court’s decision in Lawrence portends that the meaning of marriage will soon be removed from the realm of democratic debate, adjustment, compromise and resolution. This is a serious, and profoundly suspect, matter of structural constitutional law.

America in 2009 faces the question President Roosevelt confronted in 1936 and 1937: When the precise words of the Constitution, considered in light of the country’s constitutional traditions, do not provide an indisputable answer for the resolution of a contentious moral, ethical and political question, who charts the Republic’s course? The People or the Court?

As the People of Kenya set out to adopt their own new Constitution, they would do well to at least cast an eye at the modern American experience. Written Constitutions can be lost not only by outright corruption and fraud, but by (ostensibly well-intentioned) judicial over-reaching. The Kenyan people have suffered at the hands of elected politicians. In establishing a new written Constitution to prevent such abuses in the future, they would do well to recognize that judges – along with elected officials – can (and unfortunately do) exceed their power. Any nation that ignores the American experience is either (1) willing to consign its future to the (so-far debatable) good-will, self-restraint and unerring vision of its judges or (2) unwilling to engage in the truly difficult task of honest-to-goodness democratic self-governance. Kenya – as its new Constitution takes root – should guard its hard-fought democratic rights by including constitutional

106 Abraham Lincoln’s First Inaugural Address, 4 March 1861, available at <http://www.bartleby.com/124/pres31.html> (last visited 17 October 2005). Compare also Lincoln’s Gettysburg Address (noting that the Civil War involved whether “government of the people, by the people, [and] for the people” will “perish”) available at <http://www.law.ou.edu/hist/getty.html> (last visited on 17 October 2005).

text protecting the fundamental right of self-governance from autocratic judicial control. Such provisions might include language expressly stating that the meaning of the Kenyan Constitution is to be derived from the “plain language” of the text as “commonly construed.” Additional safeguards might include a provision for a legislative vacatur of any decision of the Kenyan Supreme High Court by means of a 60% supermajority vote of the Kenyan legislature and signature of the nation’s Chief Executive Officer. Such a vacatur would not adversely affect the rights of the parties to the case; it would merely prevent the decision from being used as precedent for future cases or as an authoritative explication of the meaning of the Kenyan Constitution.

WHY IS POST-COLONIAL AFRICA SO CRUEL? AND WHY ARE WE SO SILENT?

Bethwell A Ogot

In an article “Provisional Notes on the Postcolony”, Achille Mbembe wrote:

... the post colony is made up not of one coherent ‘public space’, nor is it determined by any single organizing principle. It is rather a plurality of ‘spheres’ and arenas, each having its own separate logic yet nonetheless liable to be entangled with other logics when operating in certain specific context: hence, the postcolonial ‘subject’ has had to learn to continuously bargain ... and improvise. Faced with this ... the postcolonial ‘subject’, mobilizes not just a single ‘identity’, but several fluid identities which, by their very nature, must be constantly ‘revised’ in order to achieve maximum instrumentality and efficacy as and when required.¹

Many scholars speak of postcolonial Africa as if it marks the end of one epoch and the beginning of a new one. This is largely because of their abhorrence for the colonial period during which power was used to distort African identities and to paint African societies as peoples without culture and history. On the other hand, some scholars, apparently disillusioned by the present situation in Africa, tend to attribute order and rationality to colonialism in contrast to contemporary instability, incompetence, greed, corruption and lust for power which have unleashed untold suffering on ordinary African men and women. Even Africans themselves sometimes express a feeling of nostalgia for the apparent authoritarian stabilities and disciplines of colonialism. And this is the paradox.

But such dichotomies are misleading and are signs of despair rather than conclusions arrived at as a result of serious study and reflection. In order to understand postcolonial Africa, there is a need to reconnect the present with the colonial and pre-colonial pasts. But this should not be done as a simple narrative, periodizing from the pre-colonial to the colonial to the post-colonial, because history is never a linear progress. The nature and impact of the colonial legacy, for example, is problematic and contested. At the same time, there is the need to reach beyond the fractures inflicted by the postcolonial world to draw on the rich pre-colonial sources. By way of illustration, let me cite two examples.

The first case is the insightful survey by Jan Vansina, an eminent Belgian historian, who has devoted a lifetime to the study of Africa and her peoples, of the whole equatorial region.²³ According to Vansina, colonial ethnicity, customary law

1 Mbembe Achille, ‘Provisional Notes on the Postcolony’, *Africa* (62) 1:3-37.

2 Vansina Jan, *Paths in the Rainforests. Towards a History of Political Tradition in Equatorial Africa*. (London: James Currey, 1990).

and other invented “traditions” represented the death of the true equatorial tradition of society and governance. The violence of early colonialism was disruptive enough; the “new kind of indigenous society” formed during middle colonialism was yet more alienating and decisively cut off postcolonial equatorial Africa from pre-colonial culture. Vansina writes:

As told by most history books ... it seems as if colonies sprang up complete in all details like mushrooms after a rainstorm. This view obscures the most important process that actually occurred: the conquest of equatorial Africa. It obscures its most important fact: that the conquest took 40 years to complete, that is, 40 years to destroy the equatorial tradition. It passes over the violence of an apocalyptic conquest. A combination of war, destruction by fire, disease and hunger finally succeeded in breaking overt African resistance by 1920, at the cost of an estimated half of the total population of the area.⁴

Worse still, physical violence was accompanied by cultural violence. Colonial agents and missionaries destroyed “most outward manifestations of the old tradition”; at the same time they “first built their own cognitive view of rural African society and then imposed it on daily life before or during the 1920s. The only concession to the equatorial way of life was to preserve some cultural flotsam and jetsam, and to erect a structure called customary law, which was utterly foreign to the spirit of the former tradition. Customary law was the headstone on its grave.”⁵

Thus, several decades before postcolonial writers like ourselves discovered that things were falling apart in Congo, “the familiar old ways of life were reeling” and there was “a tragic chasm between the physical and the cognitive realities”. “New explanations and major adjustments” of the equatorial tradition were required, but they were not achieved. A Christian youth revolution ridiculed all tradition without being able to replace it: “witchcraft now ran unchecked.” It all sounds very much like the postcolonial societies in Africa. Vansina concludes:

The equatorial tradition finally died in the 1920s ... The conquest prevented the tradition from inventing new structures to cope with a new situation. Instead the colonial government invented them ... The whole structure made sense only in the cognitive world of Europeans, not in the equatorial tradition. The cognitive part of the old tradition, its very core, went into irreversible crisis. The peoples of the rainforests turned into cultural schizophrenics ... when independence loomed, insecurity exploded. The

3 Vansina Jan, *Paths in the Rainforests. Towards a History of Political Tradition in Equatorial Africa*. (London: James Currey, 1990).

4 Vansina Jan, page 239.

5 Vansina Jan, page 239.

rural population sensed that there was no turning back to an unsullied age of ancient tradition.⁶

This violent insecurity led to great outbursts of witch – finding: “Variants of neo-African tradition were gestating in cities and countryside.” And the transition to independence – to post colonialism – took place without the guidance of a basic new common tradition. Today, “the people of equatorial Africa are still bereft of a common mind and purpose.”⁷

Second text comes from nearer home. In a book with a somewhat bewitching title of *When we began, there were Witchmen. An Oral History from Mount Kenya* (1993), JA Fadiman, who collected his oral material between 1969 and 1970, when he was a Research Associate in my Department in the University College, Nairobi, finally produced this refreshing account of colonial Kenya in 1993.⁸

Fadiman produces an account of conquest and disruption, which, in effect, is an account of the making of the Meru, as a self-conscious entity. His early colonialism is very much like Vansina’s: a time of violence, disruption, disease and famine. His Meru are made through a multitude of small cultural transactions and a host of immigrations to Mount Kenya. From this account, it is clear that colonial conquest brought a traumatic inversion of roles:

Meru warrior-hood began to die as the road emerged within the forests. The transformation of war leaders into chiefs and enforcers and their rank and file into labourers did far more to kill the military ethic than mere surrender without battle. For the first time in their history warriors of an entire generation were forced to take a role reserved for women, working as equals beside them and sharing identical punishment.⁹

Senior warriors,” that is, men in their late twenties, became chiefs and headmen, an idea which “initially horrified those chosen, since subordination to the elders had formed the core of Meru communal thought.”¹⁰

One response to the falling apart of the traditional set-up was a Christian youth revolution, in which boys grasped at the pleasure and power of learning to read; followed Christian fashions of dress and hairstyle; and rejected warrior-hood. They were mocked, jostled, beaten by youth who still clung to warrior tradition. On one occasion in 1913, five Christian boys were burned to death when their hut was

6 Vansina Jan, page 415.

7 Vansina Jan, page 48.

8 Jeffrey A Fadiman, *When We Began, There Were Witchmen: An Oral History from Mount Kenya*. (Berkeley: University of California Press, 1993).

9 Jeffrey A Fadiman, page 140.

10 Jeffrey A Fadiman, page 142.

fired. These cleavages and tensions came to their climax in the First World War. Fadiman writes:

The second generation of colonialism is remembered as the time of *Urogi*, or ‘witchcraft’, when growing numbers of the conquered turned to the supernatural to bring some sense of comfort to their lives ... World War I reached Meru in mid 1915 ... long lines of newly disarmed warriors were roped together and marched off to war, to be used as carriers. By 1916, they began to return, emaciated; stumbling skeletons ... With them came the dysentery contracted while on the campaign. It broke out in every Meru region and among those of every age ... administrators began to record scores, then hundreds, and finally thousands of deaths ... In 1917-1918 the rising tide of illness was intensified by famine.¹¹

There followed cattle disease and a flu epidemic. These disasters triggered strife between age-sets, and profound economic depression. The Meru “plunged into despair.”: “What remained among men of the younger age-sets was a raging sense of betrayal, joined to feelings of rising despair as intense and poignant as those felt by their elders. For perhaps the first time in Meru history, neither the present nor the future offered hope.”¹² The 1920s are remembered as a time of witch-finding and of secret societies.

However, Fadiman contends that the 1930s could be represented as a “golden age” of stability and unity. Under administrators sympathetic to ‘custom,’ a “fragile alliance, colonial and Meru, came to life.” This decade is closer to the model of colonialism implied by the contrast with the “post-colonialism.” But, as Fadiman notes, the new era was brief, because the alliance was an alliance of elders which did not include the youth. In years to come some of them formed independent churches and schools; some took Mau Mau oaths; and “finally the people of Mount Kenya would revolt, and the men of Meru – driven apart by what would become a Gikuyu civil war – would fight on both sides, their tribal unity destroyed.”¹³

But the pre-colonial Africa was not a golden age of peace and democracy as the two texts cited above might suggest. As students of African political history and contemporary politics, we should avoid the temptation to simplify and romanticize African political history. A comprehensive analysis of pre-colonial African politics (which I have not attempted in this paper) would reveal complex conceptions of the state and politics as contested theatres of power between communities, classes,

11 Jeffrey A Fadiman, pages 256 – 60.

12 Jeffrey A Fadiman, page 264.

13 Jeffrey A Fadiman, page 346.

and gender groups. Such an analysis would demonstrate that Africa has many contradictory political traditions, combining values that were democratic and authoritarian, egalitarian and aristocratic, popular and militaristic. All these traditions, however, were not static: they changed over time.

As the two texts cited above show, the European conquest of Africa came with a sudden ferocity. It involved complex military and political processes, which involved excessive use of force, as well as manipulation of local crises and divisions, the forging of alliances, and the gradual subordination of the allies and collaborators to the expanding public controls and logic of imperial rule. The scramble for Africa, it should be noted, was far more concentrated, intense, and competitive than in other regions. Within about twenty five years, it was all over. Also, it included a far more comprehensive cultural project than was the case in Asia, for example, where strong Buddhist, Hindu and Islamic traditions, among others, offered still stronger resistance to western cultural penetration.

In trying to interpret events in contemporary Africa, the African scholars have all too willingly simply adopted Western paradigms, ranging from dependency or Marxist theories to modernist and postmodernist frameworks. The colonization of Africa occurred in the heyday of the great theories of evolution and historical causation. In social and cultural terms, the Africans were placed near the bottom of the evolutionary scale. Hence, the colonial “mission” was justified on the basis that it would bring development and “civilization” which European imperial rule would undoubtedly create and sustain. African nationalists and the rulers of post-colonial Africa embraced the theories of development which both left and right proposed in the 1960s. Unfortunately, all such theories, whether economic, political or cultural, have failed to explain convincingly what is going on in Africa. The post-colonial disillusion at the lack of “progress” in Africa is thus not just a matter of disabused colonial pride but also the process of coming to terms with the end of the great colonial dream – itself part of the realization of the limitation of the Marxist as well as non-Marxist theories of historical causation. It is therefore incumbent upon us to study the current historical, intellectual and ideological contexts within which we, as Africans, are trying to establish what the real peculiarities of postcolonial Africa are. What is our perception of these events and what interpretation do we give them?

The post-colonial disillusion at the lack of “progress” in Africa has led to a revisionist outlook on European colonial history and its heritage which maintains that:

- (a) the colonial world benefited from colonial rule;
- (b) former colonies have been worse off since independence;
- (c) Europeans should therefore be proud of their colonial achievement.

Hence, what is happening in Africa today cannot be blamed on European or neo-colonialism, but on a kind of barbarity which is typically African. The West therefore reduces violence in Africa to 'tribal' hostility, political greed or incompetence, despite the fact that there has been equally savage political brutality outside Africa, for example, in the former Yugoslavia. These are shared equally throughout the world; and what is happening in Africa in this respect is no different from what has happened elsewhere, for example in Stalin's Gulag.

Africans are therefore accused of "regressing." The idea that a people can regress or "go back" is based on the outmoded assumption about the linearity of "progress". The perception is that individuals in Africa increasingly are behaving according to norms, criteria and values, more associated with the so-called traditional Africa than with the Africa which the colonial masters thought they had constructed. To the West, this is not acceptable. They are demanding to know why African politics have "degenerated" or "regressed" from what were seen as relatively auspicious political circumstances of their birth at independence. But is it correct to interpret what is happening in contemporary Africa as a degeneration of a "modern" model of politics? And whose model?

We are further told by Western scholars that the "new nations" of Africa, like other nations, are no more than "imagined communities." According to Benedict Anderson, the author of this famous phrase, nationalism, nationality, and nation – ness are "cultural artefacts" of a particular kind:

To understand them properly we need to consider carefully how they have come into historical being, in what way the meanings have changed over time, and why, today, they command such profound legitimacy.¹⁴

Ernest Gellner, however, goes further to argue that new African nations were not only imagined, they were in fact invented. The African state, he contends, is culturally an anomaly. African nationalisms exemplify the opposite extreme of the earlier European forms in that the African nationalism neither perpetuated nor invented a local high culture, nor did it elevate an erstwhile African folk culture into a new, politically sanctioned literate culture, as European nations had done.

14 Anderson Benedict, *Imagined Community*. (London: Verso, 1983, page 4).

Instead, African “nations” persist in using an alien European high culture. He concludes:

Sub-Sahara Africa is one of the best and certainly the most extensive, testing grounds for the attribution of great power to the principle of nationalism, which requires ethnic and political boundaries to converge. Sub-Saharan political boundaries defy this principle almost without exception. Black Africa has inherited from the colonial period a set of frontiers drawn up in total disregard and generally without the skeletal knowledge, of cultural or ethnic borders.¹⁵

But despite the inheritance of European high culture in the form of official languages, Gellner nevertheless acknowledged that there have been few challenges to the anomalies. Perhaps the alleged failure of the post-colonial state in Africa may be attributed to the fact that European colonialism succeeded in totally subordinating African communities to its colonial project. If this is true, then it poses a major dilemma as to a future cultural self-transformation in Africa.

Another political scientist, Crawford Young, regards the territorial ambiguity of the colonial state as having paradoxically proved one of the most enduring impacts of the colonial rule. According to him, it became the structure of legitimation of the African nationalist petty bourgeoisies. And the colonialists, in developing their “nation – building” project, which the African petty bourgeois elite took over, had a more comprehensive cultural component in its ideologies and administration, which insisted on the inferiority of the African people. The socialization impact of this racist ideology, according to Crawford, affected the attitudes of the elites towards their own populations.

In other words, although European colonial rule in Africa had just a couple of generations to entrench itself (except in South Africa), this was long enough to undermine African societies, institutions and values. However, it was not long enough to replace these institutions and values with new ways of life or establish new systems of government. In the event, colonialism undermined African’s self-confidence without creating the basis for a new one.

But the African nationalist elite who took over this colonially created state and “nation” did not deconstruct the colonial institutions in order to reconstitute a new African national state. They merely adopted Western models of governance. They had been socialized through the colonial system of education to admire European values. The result was an alienated intelligentsia. This cultural alienation and ambivalence among the African intelligentsia has persisted since independence, and

15 Ernest Gellner, *Nations and Nationalism* (Oxford: 1983, page 81).

has been reproduced through an inadequately decolonized education system, resulting in the continued domination of a Western epistemological order in/of African studies. The result has been predatory rule in Africa: Malawi under Banda, Togo under Eyadema, Congo under Mobutu, Liberia under Doe, and Kenya under Moi. In short, Africa under predatory rulers, practiced what has been called "Politics of the Belly." In such situations, the citizens, in both rural and urban areas, have turned to cultural traditions as a means of coping with failed authoritarian and modernization projects. Some of these traditions are "invented." This is the process which has been referred to as the "modernity of tradition." Witchcraft and witch-hunting prevail, and change can only come from occult forces. Postcolonial Africa is thus much more like colonial Africa than most of us have hitherto imagined. Hence, our discussion on contemporary African politics must of necessity start from the distinctive postcolonial realities of multiple arenas, fluid identities and positional relations of power, all of which are at once within and also negotiably constitutive of the state. We must then proceed to address three other fundamental problems: the modes of local resiliency, the cultural assertion of social identities for survival, and the recuperation of moral and political agency.

Matters have been made more complex by the new phenomenon of globalization. We are today told that nationalism and the nation-state are anachronisms in contemporary Africa. As the international economy spreads worldwide, it is argued, countries are becoming increasingly interdependent. Outdated considerations of international diplomacy and politics will become secondary to the economic imperatives guided by the WTO agreements.

Furthermore, the current technological revolution in telecommunications is creating conditions in which news, information, visual and documentary material will become available simultaneously in all parts of the world, thus invalidating national boundaries concretely and symbolically. This globalization of information will also force the political focus away from the more parochial nation – centred issues.

But is the nation-state in Africa no longer appropriate for its future well-being? It is worth bearing in mind that the internationalization of the economy goes hand in hand with the globalization of culture. The recent events in the former Soviet Union and Eastern Europe as well as examples of "ethnic" violence in Africa, have shown that the weakness of the state is likely to release the pent-up frustration of intra-rather than supra-national energy. In other words, the failures of the nation – states are likely to result in more, rather than less, "nationalist" politics. Certainly in Africa, the signs all point in that direction.

Closely related to this globalization phenomenon is the postmodernist discourse which emphasizes the interconnection between identity and values. The postmodernists argue that the contemporary world is one in which individual identities are increasingly cross-cultural and values increasingly relative. The globalization of culture, they contend, has created conditions in which societies experience progressively diverse cultural influences; and at the same time the modern world is one in which the force of absolute collective moral or religious imperatives is in decline and the creativity of individualisms is seen increasingly to nourish artistic and scientific achievements.

But to what extent is this postmodernist discourse relevant to the condition of Africa? First, the whole notion of postmodernism is one rooted in Western cultural and sociological self-examination, and even there it is now hotly contested. The notion of the individual as being increasingly multicultural and universal in outlook makes it more difficult to understand the ways in which Africans behave as individuals. It would also be in contradiction with what in other contexts have been termed “regression” in African societies.

Then there is the current debate about “the end of history” popularized by Francis Fukuyama in his neo-Hegelian book *The End of History and the Last Man*.¹⁶

The argument here is that we are now living in a post-ideological world, because with the end of the Cold War and the apparent collapse of Communism, there is now no longer any ideological battle to be fought. Socialism is dead and there is no worthwhile political ideology to challenge the liberal democratic ideal. Hence, the political agenda is now firmly one of democratization or more broadly, improvement in democratic political accountability.

But are the consequences of the end of the Cold War in Africa ideological or practical? True, the end of superpower rivalry and the *de facto* supremacy of the West in international affairs have created a new political context for Africa. The diplomatic options of the African States and the scope of their agenda have definitely been narrowed. “African Socialism” is dead and all former “Socialist” countries now officially favour economic and political liberation. But these are practical consequences.

In terms of ideology, many African leaders “became” democrats because the World Bank said they should, not because they suddenly saw the light and accepted, either that democratization is a ‘better’ political way forward or that their

16 Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

rule should be subject to democratic political accountability. The former President of Kenya, Daniel arap Moi, has been attributing all the social and political ills that have befallen Kenya since 1991 when Kenya reintroduced multi-partism, to “democracy.”

The assumption, therefore, that the end of the Cold War is *ipso facto* likely to strengthen democratization in Africa is an illusion. Nor can the death of socialism seriously be taken to mark the advent of a post-ideological world. First, China is still a communist country; and secondly, there are other non-socialist “ideologies” currently challenging the liberal democratic ethos: the religious and the nationalist, which often combine, as is demonstrated in countries such as Iran. Third, the belief that the ruin of one ideology implies the advent of a less ideological world is based on the naïve assumption that there is an ascending political evolution by which Man eventually leaves ideology behind.

Hence, the present debate about democratization in Africa is deficient in many aspects. First, it assumes, without firm evidence, that there is a simple causal relation between “the end of ideology” and democratization. Secondly, the debate assumes that there is indeed in Africa a move towards a greater political accountability. The process is far more complex, and unless the complexity is understood we run the risk of comforting ourselves once more with what will turn out to be only the latest delusion about Africa.

Worse still, the agenda for democratization in Africa is largely set by the West, with the (more or less enthusiastic) acquiescence of those of us who have learned to speak the new language of democracy. The West demands a democracy it can recognize itself: party plurality, party competition, regular multiparty elections and parliamentary politics. Such a strong emphasis on political parties ignores the sad fact that in most African countries (including Kenya), political parties are regarded by leaders as no different from *matatus* which you change at will, depending on the destination! Africans oblige by setting in motion a process of democratization which meets these conditionalities. Whether such compliance advances the cause of democracy is another matter. It is doubtful whether this Western recipe of multiparty politics strengthens political accountability in Africa.

Furthermore, democracy is not “complete” even in the Western World, despite their pretensions to the contrary. The meaning and social content of democracy will continue to expand and deepen as subjugated classes, genders, peoples and nations seek civil freedoms, political empowerment, and material development. It is out of such contemporary struggles that African democracies will emerge, determined by the continent’s complex and contradictory pasts, and the

visions being dreamed of, and the practices and capacities being built, by the numerous social and democratic movements across the continent.

But while it is easy to dismiss such extraneous notions which attempt to explain African politics, the crucial question is: What is our own understanding of African politics? How do Africans perceive their politics? What is it that is 'African' in African politics? I have attempted to suggest that in order to understand contemporary African politics, it is essential that we ground our political analysis in the history of Africa – that is, the history that reconnects the present with the colonial and pre-colonial pasts. Such history would suggest three important areas which need deep analysis.

First, we need a thorough study of the relationship between identity and politics. Such an inquiry would involve a definition of the notion of the individual, the meaning of a political community, the political language of Africans, the foundations of political legitimacy and the components of political accountability.

Second, there is an urgent need to study the relationship between the nation and the state in Africa. It is important to discuss whether Africa needs a stronger state or a more decentralized one; how to develop more accountable politics in Africa; the debate about the changing complexion (or possible demise) of the post-nationalist nation – state in Africa; the break-up of some independent countries; the debate about regionalism and pan-Africanism; and the possibilities of a federal Africa.

The third important area is the connection between culture and economic development. This is a complex issue; but basically it means an investigation into whether the causes of Africa's apparent lack of economic development, that is productive investment, are to be found in its cultural make-up. The study should cover the nature of Africa's economic dependence, the relationship between mentalities and technological development; and the role of political leadership in economic development.

THE SEARCH FOR PEACE AND JUSTICE IN CONTEMPORARY AFRICAN SOCIETIES

We have attempted to show how, over time, and in a plurality of contested arenas, post-colonial strategies improvise multiple shifting identities. In doing this, they rejected history as a linear progress and have, therefore, taken the colonial legacy to be problematic. Also stressed is the need to break down the barriers between post-colonial Africa and its colonial and pre-colonial pasts.

Colonial identities, far from being exclusively ascribed and monolithic, were hybrid. Colonial powers “invented” Kenya, Uganda, Nigeria, Ghana, etc. Colonialism also invented ethnicity. This involved ascribing monolithic identities and causing tremendous upheaval and affront to the “take-for-granted” world. Bounded ethnicities replaced previous much more fluid, multicultural and multilingual networks of interaction and identity. This great disruption was involved in drastically narrowing down the African religious, social and economic worlds while at the same time enlarging the administrative and political. The various types of chiefs and other colonial agents re-established their dominance over other social categories by means of political relationships to the imperial world and new types of economic translations. A new kind of indigenous society was formed and one of its characteristic features was the co-existence of different newly invented “ethnic groups.” The various newly created African countries were divided into bounded ethnic groups, a process which has become a permanent feature of modern Africa.

With political independence in Africa came the ever more pervasive condition in late capitalist domination by Western metropolitan powers, including the transnational corporations and global agencies which are metropolitan based. The control over economic flows across their boundaries by African states, became minimal; and the political leaders abandoned the populist promises of the early nationalist period; the state lapsed from public security into political violence, fostered by foreign arms dumping; the states withdrew from public welfare institutions, encouraged by foreign donors, resulting in the impoverishment of their citizens; and the African elites became part of global consumerism. The result was a captive leadership and the emergence of predicaments of local, national and transnational identities and subjectivities. Little effort has been made to encourage the active engagement of people themselves in the creation of their own political and cultural agendas. Hence, the social struggles over the imperatives of human and citizenship rights within the moral and political economy must continue. It is therefore appropriate to end our discussion with the questions we started with: “Why is post-colonial Africa so cruel?” and “For whom is the struggle continuing?”

Post-colonial Africa has produced some of the worst dictators humanity has ever known: Jean Bedel-Bokassa in Central African Republic, Idi Amin Dada of Uganda, Michel Micombero in Burundi, Lt Col Mengistu Haile Mariam of Ethiopia who killed more than half a million people in the Red and White Terror Campaigns, and Charles Taylor of Liberia. It has also produced its genocides first in Rwanda and now in Darfur where President Omar Bashir has become the first

sitting head of state in the world to be indicted by the International Criminal Court (ICC) at The Hague. Another genocide is quietly being committed by President Yoweri Museveni in Northern Uganda. But while African leaders and scholars are asking why only, or mainly, African leaders or alleged African perpetrators are being arrested and extradited to The Hague, apart from Serbs, they, on the other hand, prefer to remain silent on the punishment which should be meted out to African leaders who commit genocide. As the poem by Okello Oculi demands, why are we: “Silent to our murderers, walking in front of Uniforms of guns, Compromising Man, Shaming God to our accomplices?”

In the case of the 1994 genocide in Rwanda in which the Interahamwe, a “Hutu militia” slaughtered about a million people, mostly “Tutsi”, the International Criminal Tribunal for Rwanda (ICTR), sitting in Arusha, is scheduled to wind up in 2010, without bringing to book the masterminds of the genocide. Their efforts have brought no peace to Rwanda, let alone justice. On the other hand, in Rwanda itself, reconciliation methods have used traditional cultural models to build trust between communities. When the genocide ended in July 1994, more than 120,000 people were arrested on suspicion of carrying out the genocide. The government, led by Paul Kagame, took a very firm stand that the genocide suspects had to face the full force of the law. On 24 April 1998, Rwandan authorities, true to its promise, executed 22 people convicted of involvement in the genocide. But these were the last public executions. Shortly after, a decision was taken that nearly all the other suspects would be tried in traditional courts (*gacaca*). If they confessed or sought forgiveness, they would be granted amnesty and accepted back in their communities. On August 2007, nine years after the first executions, Rwanda became the first country in Eastern Africa to abolish the death penalty for all crimes, including genocide. The leaders of Rwanda decided to forgive and not to forget, in order to give the country a chance.

The National Unity and Reconciliation Commission was set up by the Rwandan Parliament in March 1999, to use home grown models such as the *Ingando*, which puts survivors and perpetrators together in a retreat for a month in order to eradicate stereotypes. Qualitatively, the fact that people are now comparatively happy to live together in mixed settlements is a sign of success. National summits on reconciliation are held every two years to monitor and evaluate the process and stiff penalties, including life – imprisonment, have been prescribed for ethnic discrimination or for preaching genocide ideology. Is it surprising that the present Rwandan Parliament is the first in the world with a female majority: women hold 44 of the 80 seats.

Next door in Uganda, the International Criminal Court (ICC) is a stumbling block to the achievement of peace in Northern Uganda. President Yoweri Museveni referred the Lord's Resistance Army (LRA) case to the ICC in December, 2003. In July, 2005, the Court issued arrest warrants against Joseph Kony, leader of LRA and four senior commanders, two of whom have since died. But where the most terrible atrocities have been committed on the one hand by the LRA, and on the other hand, genocide by President Museveni, how do you balance the requirements of justice and peace? The Acholi community who are the people most affected, strongly feel that the arrest warrants, which cannot be withdrawn without the consent of the court, are themselves a tangible threat to peace in Northern Uganda. As is the case in Rwanda, the mediation committee chaired by Dr Riek Machar, Vice-President of Southern Sudan, recommends a court or body that would promote accountability and reconciliation by enquiring into human rights violation during the 22-year conflict which has claimed the lives of over a million people, and internally displaced many more. Such a body would promote truth-telling in communities and work with traditional or other community reconciliation interlocutors.

But the Court's chief prosecutor, Luis Moreno-Ocampo, argues that suspending the arrest warrants could encourage impunity, while putting at risk the credibility of the ICC. He fears that if this case fails, it could undermine the Court's deterrent effect. No wonder a trial at The Hague is seen by some Africans as neo-colonial justice.

In the Sudan, the Darfur conflict is essentially an ethnic war resulting from long-standing enmity between African farmers and "Arab" nomads who are supported by the Sudanese government which prosecutes the war through a surrogate militia known as the Janjaweed. Over 2.5 million people have been displaced and about 300,000 have been killed.

African leaders and scholars argue that the indictment for war crimes by the ICC of President al-Barshir of Sudan is a bad thing for peace in Darfur. But faced with the grim situation in Darfur, that is, the perpetration of genocide by Bashir, what peace are the Africans talking about, except peace of the cemetery! This is particularly distressing, as Bashir has denounced the prosecutor's request and rejected the authority of the ICC altogether. Within days, the African Union and Organization of Islamic Conference called on the Security Council to defer the case against Bashir, claiming it thwarted prospects for peace. They also feared retaliation against peace-keepers and humanitarian workers in Sudan. Nearly half of the Security Council had expressed support for a deferral. Is it fair to suspend

justice in exchange for promises to end a genocide, especially as President Bashir is notorious for not keeping promises? Is justice not a partner to peace, not an impediment to it? For whom is the struggle continuing in Africa?

Following the 2007 disputed elections, violence erupted in Kenya along ethnic lines. Individuals who had lived their whole lives in different parts of the country fled for safety fearing former friends and neighbours as well as organized militia and youth gangs. They were now expected to go back to so-called “ancestral homes,” which in many cases never existed. Organized gangs patrolled slums and various parts of the countryside, extracting retribution, as well as killing, robbing, raping and destroying property. Later retaliatory violence began in Nakuru, Naivasha and Tigoni with Kikuyu gangs going after both Luos and Kalenjins. By February 2008, over 1000 people were dead and about 350,000 had been displaced. The idea of a nation had been fractured and Kenya appeared on the brink of a major collapse.

In order to avert the situation of Kenya degenerating into a failed state, the Grand National Coalition was formed, based on the principle of reconciliation. But Grand Coalition governments all over the world tend to emphasise stability and hence the *status quo*, instead of reforms. The Kenya Government in particular, and citizens generally, have already forgotten the mayhem that faced the country in early 2008. That is why they hurriedly launched *Operation Rudi Nyumbani* for the large numbers of the Internally Displaced Persons (IDPs). But can *Operation Rudi Nyumbani* cure Kenyans of the disease of ethnic chauvinism that threatened to tear the country apart in 2007? Can it bring justice and peace? Can it promote reconciliation? The answer to all those questions, in my view, is “No.” To begin with, what is *nyumbani* for the large number of Kikuyu who were evicted from the Rift Valley? In most cases, these are disputed territories whose ownership is being contested. And for the western Kenyans who were evicted from Naivasha, Nakuru, Thika and Kiambu, where is *nyumbani*? More fundamentally, meaningful reconciliation must involve agreement between the victims and the perpetrators to live together in harmony. This is an important factor which has been completely ignored in *Operation Rudi Nyumbani*, in which victims are escorted back to their “homes” by the police, the military and sometimes the Ministers of Defence and Internal Security, in order to display the might of the government. But can reconciliation ever be achieved through force? Is there no home-grown method of reconciliation that can be used instead of building more police posts to protect the victims?

Then came the Report of the Commission of Inquiry into the Post-Election Violence which was chaired by Justice Philip Waki. The Waki Commission was

established under the mediation agreements chaired by Kofi Annan, a former UN Secretary-General. The 500-page report, popularly known as the Waki Report, established that 1,133 people were killed in the first three months of 2008, that rape and sexual violence were rampant, that property of unknown value on over 117,000 sites was destroyed, and that over 300,000 people were displaced from their homes. The report further reveals that security forces were the leading cause of death, accounting for a shocking 35.7 per cent of all deaths. Also, the highest number of deaths by ethnicity recorded were: Luo deaths at 278; Gikuyu deaths at 268; Luyha deaths at 163; and Kalenjin deaths at 158.

Sexual violence was extreme; including individual and gang rapes of both women and men targeted because of their ethnicity and assumed political affiliation. Forced male circumcision and castration were rampant.

The security forces are indicted by the report both for excessive and illegal use of force as well as for criminal acts ranging from murder to gang rape and looting. The Attorney General is indicted for failure to act on impunity in the past.

The Waki recommendations are an attempt to break the cycle of violence and impunity that has turned Kenya into an unstable country. A large section of Kenya's political elite is demanding that the report must be rubbished and the suspected perpetrators be forgiven. What about the victims and their survivors?

The Waki Report paints Kenya as a very sick society with a failed political system. But it has given the Kenyan political class a chance to redeem itself. Will it rise to the challenge?

In conclusion, let me go back to our initial questions in this paper. Why are we "Silent to our murderers, walking in front of uniforms of guns, Comprising Man Shaming God to our accomplices?" Why are we silent about the genocide being perpetrated in Northern Uganda, where for about twenty years now a Ugandan Gulag has been in operation? Why are African leaders and scholars arguing that the indictment for war crimes by the ICC of President al-Bashir of Sudan is a bad thing for peace in Darfur? Why do the Kenya political elite feel that the Waki Report will destroy the country? And why are we silent about Congo's epic tragedy, where, though blessed with incomparable endowment of mines and water and abundant fertile land, this vast nation, the size of Western Europe, has known little but domination and war since its founding as a colony under King Leopold II of Belgium in the nineteenth century? It is estimated, for example, that as many as five million people have died in these wars in the Congo since the mid-1990s, mostly from hunger and disease. Who, then, are we struggling for?

PHILOSOPHICAL FOUNDATIONS OF GOVERNANCE INSTITUTIONS

David W Lutz

I. FEDERALISM AND THE COMMON GOOD

Kenya is suffering from a mismatch between its traditional cultures and its governance institutions, which are modelled after institutions created within and for a quite different culture. Traditional cultures – whether African, Asian or European – are communal. Modern British culture, in contrast, is individualistic. Institutions that are at home within one culture may be strangers to a different culture. What it means to be a Member of Parliament in Kenya is quite different from what it means in the United Kingdom. A Kenyan MP spends far more time attempting to solve the personal problems of his or her community members than sitting in Parliament.

Both forms of democracy most common in the West, liberal democracy and social democracy, are inconsistent with African cultures and inappropriate for Kenya. The greatest problem with liberal democracy is that it is individualistic. The greatest problem with social democracy is that it attempts to treat an entire country as a community. What Kenya needs is a federal system of governance institutions.

The historical roots of the idea of federalism can be found in Aristotle's understanding that a larger community can contain smaller communities: "All communities would seem to be parts of the political community."¹ As Andreas Føllesdal explains:

Federalism is the theory or advocacy of federal political orders, where final authority is divided between sub-units and a center. Unlike a unitary state, sovereignty is constitutionally split between at least two territorial levels so that units at each level have final authority and can act independently of the others in some area. Citizens thus have political obligations to two authorities.²

Federalist government is superior to both individualistic and centralised government, especially in a large, multi-ethnic country. In the words of Peter Kagwanja and Willy Mutunga: "As a system of devolving state power horizontally, federalism is viewed as accommodating and inclusive of diverse cultures and identities. It, therefore, suits large countries or those with competing racial or

1 Aristotle, *Nicomachean Ethics*, trans Terence Irwin (Indianapolis: Hackett, 1985), 1160a9–10.

2 Andreas Føllesdal, "Federalism", *Stanford Encyclopedia of Philosophy*, 12 October 2006, online: <http://plato.stanford.edu/entries/federalism>.

religious identity problems and is widely prescribed for ethnically divided societies in Africa.”³

Because as Aristotle tells us, “man is by nature a political animal,”⁴ we achieve our personal good within communities, not as isolated individuals. And true communities are relatively small. In the words of EF Schumacher, “People can be themselves only in small comprehensible groups.”⁵

Many governmental functions can be performed best within communities whose members know one another personally. At the same time, because of economies of scale, some governmental functions, such as military defence and minting of coins, can best be performed by central governments. Therefore, we need governance institutions that permit us to do at the local level what we can best do there and to do at higher levels what we can best do there.

Federalism, a concept of political philosophy, is closely related to subsidiarity, a concept of social philosophy. The classic definition of subsidiarity was provided by Pius XI:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.⁶

Marcus Spiller explains that subsidiarity “relates to the sharing of power, the default position being that decisions should be made at the lower level in the hierarchy of communities”⁷ And Yves Simon relates subsidiarity to politics, by explaining that it may sometimes be necessary for a higher governance institution to assist a lower one in achieving the good of a community:

The common good of a city has the character of a proper good for any unit in which the city is contained and for other cities as well. Just as an individual may need to be directed in the pursuit of his individual good, so a community may be unable to attain its own common good without guidance. Thus, if certain duties relative to the welfare of a city and normally discharged by it are taken over by the state on account of the city’s inability

3 Peter Kagwanja and Willy Mutunga, “Is Majimbo Federalism? Constitutional Debate in a Tribal Shark-Tank”, *The Nation*, 20 May 2001.

4 Aristotle, *Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1984), 1253a2-3.

5 EF Schumacher, *Small Is Beautiful: Economics as if People Mattered* (London: Blond & Briggs, 1973), page 80.

6 Pius XI, *Encyclical Letter Quadragesimo Anno* (15 May 1931), page 79.

7 Marcus Spiller, “Planning for ‘Community’: A Governance Perspective”, Paper presented at the Changing the Way Government Works Seminar (Institute of Public Administration Australia Victoria, Melbourne, 5 October 2004).

to discharge them satisfactorily, the authority so exercised by the state is of the paternal type: it is not concerned (at least directly) with the common good of the state but with the proper good of the city.⁸

In Kenya, ‘federalism’ is usually translated as ‘majimbo’ or ‘majimboism’, a term often accompanied by connotations of tribalism, or even ethnic cleansing. There is disagreement, however, concerning whether Kenyan majimbo is in fact true federalism. According to Kagwanja and Mutunga, “Political thinkers and legal experts argue that the 1963 majimbo experiment was a hastily conceived, clumsy and badly thought out variant of federalism.”⁹ And Jacqueline Klopp maintains that the term ‘majimbo’ and its relationship with ‘federalism’ have been abused in the past:

To evoke *majimboism* in the 1990s was to imply that once again ‘minority groups’ needed protection from a feared Kikuyu domination of the state. *Majimboism* was used to counter the idea of multi-partyism by painting it as an exclusionary project of domination. To legitimise this project KANU bosses equated *majimboism* with federalism, which academic circles were advocating as a solution to ethnic conflict. However, this was sheer rhetoric; any discussion of democratising provincial politics or devolving power to a provincial parliament was muted.¹⁰

Nevertheless, whatever the problems with *majimbo*, Kenya must meet the challenge of achieving federalism and subsidiarity, while repudiating tribalism. We cannot disregard principles as important as federalism and subsidiarity simply because historical injustices have taken place in the name of *majimboism*. Nor should the historical failure of the East African Federation prevent us from pursuing federalism at the country level. Whatever may be the obstacles to achieving true federalism, accepting this responsibility is better than the alternative courses of action, because the common good is best achieved within true communities.

II. GOVERNANCE WITHOUT COMMUNITIES

One alternative to understanding governance in terms of communities and the common good is the social contract tradition of political philosophy. Whereas traditional political theory understands that it is natural for human persons to live in communities, the social contract tradition teaches that we are naturally individualistic and that human society is artificial. As Servais Pinckaers explains:

8 Yves R. Simon, *Philosophy of Democratic Government* (Chicago: University of Chicago Press, 1951), page 11.

9 Kagwanja and Mutunga, “Is Majimbo Federalism?”.

10 Jacqueline M. Klopp, “Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya”, *African Studies*, 61, 2 (2002), 272–73.

The once general and apparently solid teaching that society is based on a natural human inclination has become in our day one of the most radical points of divergence with the advent of modern concepts of society stemming from nominalism. From the moment that man defines himself by insisting on his freedom against the same freedom of others, the natural bond with others, henceforth subjected to a choice between contraries, is twisted into antagonism and broken. No longer do we enjoy natural links with relatives and friends; we become adversaries.¹¹

Nominalism, a theory of metaphysics that is relevant to politics, is “the view that universals have no existence independently of being thought and are mere names, representing nothing that really exists”.¹² The leading philosopher of nominalism was William of Ockham, who stood within the tradition of English individualism. Frederick Copleston comments on Ockham:

One may ask what it is precisely for which the term ‘man’ stands in the proposition, ‘man is mortal’. Does it stand for a universal reality, a universal existing outside the mind? Certainly not, answers Ockham. Only individuals exist. The term ‘man’, therefore, in the proposition mentioned stands for individual men. Universality belongs to terms or names, which are signs for classes of individual things.¹³

Two of the most important social contractarians, Thomas Hobbes and John Locke, were also Englishmen. British society is highly individualistic. And, in this respect, the United States is more British than Britain. According to American economist Milton Friedman, “To the free man, the country is the collection of individuals who compose it, not something over and above them.”¹⁴ British and American governance institutions are primarily liberal democratic in character. They are rooted in the English tradition of nominalism, individualism and social contractarianism.

The main alternative to liberal democracy in British and American politics is social democracy. Karl Marx and Friedrich Engels wrote in their “Manifesto of the Communist Party” that “the first step in the revolution by the working class is to raise the proletariat to the position of ruling class, to win the battle of democracy”.¹⁵ Subsequent socialists disagreed, however, concerning whether

11 Servais Pinckaers, *The Sources of Christian Ethics*, trans. Mary Thomas Noble (Washington: The Catholic University of America Press, 1995), pages 434–35.

12 “Nominalism”, *A Dictionary of Philosophy*, ed. Antony Flew (New York: St Martin’s Press, 1979), page 232.

13 Frederick C Copleston, *Medieval Philosophy* (New York: Harper and Brothers, 1961), page 126.

14 Milton Friedman, *Capitalism and Freedom* (Chicago and London: University of Chicago Press, 1962), pages 1–2.

15 Karl Marx and Friedrich Engels, “Manifesto of the Communist Party”, in *The Marx-Engels Reader*, ed Robert C Tucker (New York: WW Norton and Co, 1972), page 352.

socialism or communism should be achieved by revolution or by evolution. Although it would be unfair to label all contemporary social democrats as Marxists, social democracy originated as the attempt to achieve Marxist objectives slowly and democratically, as a process of evolution.

A somewhat oversimplified description of contemporary British politics is that it is a struggle between liberal democracy (Conservative Party) and social democracy (Labour Party). In the United States both major parties are predominantly liberal democratic in character, though there are elements of social democracy within the Democratic Party. In the age of highly-sophisticated opinion polling, the tendency in both countries is for both parties to move towards the centre of mass of public opinion, which means that differences between parties are diminishing. But the point most relevant to the present discussion is that neither liberal democracy nor social democracy is appropriate for Kenya, for the reasons stated above: liberal democracy is individualistic and social democracy attempts to treat an entire country as a community.

III. INSTITUTIONS AND PERSONS

Governance institutions, no matter how well designed, are no better than the people who comprise them. Our goal is a country in which we have the freedom to live good lives, with an adequate supply of material goods. This requires wise leadership, just social relations, industrious workers and peace. Plato teaches us in his *Republic* that the virtues of the state are inseparable from the virtues of its citizens. The state is wise if its leaders are wise. The state is just if its citizens are just. The state is prosperous if its workers are productive. The state is at peace if its soldiers are brave and well-led. It would be a serious mistake to think that we can have good governance institutions without ethical leaders and citizens. As Marilise Smurthwaite makes the point:

Governance is really about people... It is humans who plan and implement and monitor governance systems and such systems should be directed to serving the needs of human persons. When systems of governance fail, it is ultimately because human beings have failed.¹⁶

Becoming an ethical person is not something that is achieved in a day; it is a lifelong process. Although we can cite examples of persons who made life-changing decisions in moments of crisis, such cases are exceptions, not the rule. Most of us start out in one ethical direction or another early in life, largely because

16 Marilise Smurthwaite, "Governance and Catholic Social Teaching", *St Augustine Papers*, Volume 6, number 1 (2005), page 29.

of the examples of those most influential during our youth, and then continue generally in that direction until we die. This is the way in which morality is handed down from one generation to the next.

The most important social institution in this process of handing down morality from one generation to another is the family. And the nature of the family is greatly influenced by the culture of which it is a part. Although morality is absolute and universal, the ways in which it is transmitted from generation to generation are as diverse as the cultures to which we belong. Therefore, in order to have moral citizens, we need strong families and strong cultural traditions. And, in order to have strong cultural traditions, we need to value and preserve ethnic identity.

Ethnicity is closely related to language and literature. The boundaries of an ethnic group are generally also the boundaries of a linguistic group. The proverbs and stories of a people's language are among the means of handing down morality from one generation to the next. Therefore, it is important for an ethnic group to preserve its language and literature.¹⁷

Valuing and preserving ethnic identity is not the same thing as practicing tribalism. Tribalism, treating other persons unjustly because of their ethnic identity, is evil. Tribalism is morally equivalent to racism. Anyone who condemns racism, but practices tribalism, is guilty of hypocrisy. There can be no room for tribalism in any form in a well-governed country. But the solution to the problem of tribalism is not, "Let's see ourselves as Kenyans first." The common good is realised within communities and Kenya is too large to be a true community. In order to have true communities and cultural traditions, we need ethnic identity.

The problem with "Let's see ourselves as Kenyans first" is that Kenya as a whole has no cultural tradition, because Kenya is not a nation-state. Instead of a single cultural tradition, Kenya has many traditions. This is a strength, not a weakness, but a strength that must be preserved carefully. To ask Kenyans to give up what is distinctive about their ethnic identity and just be Kenyans would be to ask them to abandon their cultural traditions. To ask them to abandon their cultural traditions would be to ask them to abandon the process of handing down morality to succeeding generations. And to abandon the process of handing down morality to succeeding generations would be to abandon hope of having good future citizens and good future governance institutions.

17

I am grateful to Professor Lucia Omondi for calling my attention to the importance of language to an ethnic group's moral tradition.

We can think about how Kenya's various ethnic groups can live together in peace and prosperity in terms of either the model of the melting pot or the model of unity in diversity. The melting pot was the American attempt to address the issue of ethnic diversity. Immigrants from different European nations abandoned their cultural traditions, started speaking English, and became Americans. The problem is that the United States has no cultural tradition of its own. Therefore, these immigrants abandoned their old cultural traditions without adopting a new one. One of the great weaknesses of the United States is the shallowness of its cultural and moral roots. This helps to explain why the USA is leading Europe in the descent towards immorality, with partial-birth abortion, homosexual 'marriage', doctor-assisted suicide, etc. Although the proportion of Americans who practice their religion is greater than in Europe, American culture is more secular than most European cultures.

The alternative model is that of unity in diversity. This involves seeking the common good of Kenya while simultaneously maintaining the solidarity of its smaller communities. There can be no unity in diversity without ethnic diversity. Henry Okullu emphasises the positive side of ethnic identity:

Tribal affiliation as an extended family system is a great asset in nation-building, especially when acting as a moral restraining influence upon, and a means of security for, its members. It can be argued that a tribe as a larger family unit is an order of creation. A nation, some people will argue, is not an aggregate of individuals, but rather a unity of independent institutions, of which tribal grouping is one. If such is true, then tribal groups are a very strong foundation upon which a strong nation can be built.¹⁸

Consequently, the challenge facing Kenyans today is to preserve all that is good in their ethnic identities and cultural traditions, while rejecting all forms of tribalism. There is the potential for a virtuous circle here: federalist governance institutions help to preserve cultural traditions; cultural traditions help to form ethical citizens; and ethical citizens help to improve federalist governance institutions.

IV. FEDERALISM AND DEMOCRACY

Although Kenya should never adopt Western models uncritically, it may be beneficial to consider the case of Switzerland. The Swiss are ethnically diverse, with four mutually-unintelligible languages, and have highly-decentralised, federalist governance institutions. But, while we may be able to learn from the Swiss, any lessons learned must be applied in Kenya in a way appropriate for the

¹⁸ J Henry Okullu, *Church and Politics in East Africa* (Nairobi: Uzima Press, 1974), page 45.

local situation. Deciding how to achieve this is a challenge for Kenyan leaders, intellectual as well as political leaders.

At this point in history, the best government we can hope for in Kenya is probably some form of democracy. For most of European history, democracy was understood to be an inferior form of government. As CB Macpherson explained in the 1960s:

Democracy used to be a bad word. Everybody who was anybody knew that democracy, in its original sense of rule by the people or government in accordance with the will of the bulk of the people, would be a bad thing – fatal to individual freedom and to all the graces of civilized living. That was the position taken by pretty nearly all men of intelligence from the earliest historical times down to about a hundred years ago. Then, within fifty years, democracy became a good thing. Its full acceptance into the ranks of respectability was apparent by the time of the First World War; a war which the Western Allied leaders could proclaim was fought to make the world safe for democracy.¹⁹

Faith in democracy as the best form of government is so dominant today that it may be difficult to believe that its dominance is so recent. It is worth noting, however, that the USA was founded as a federal republic, not a democracy – at least as its founders understood ‘democracy’. John Adams, second President of the United States, expressed his assessment of democracy in 1814: “Democracy never lasts long. It soon wastes, exhausts, and murders itself. There never was a democracy yet that did not commit suicide.”²⁰

There is much misunderstanding about how George W Bush won the American presidential election of 2000, when Albert Gore, Jr won a greater share of the popular vote. The explanation is simple: the United States Constitution is non-democratic – and deliberately so. Contrary to the intentions of its founders, the USA has become democratic. Our method of choosing presidents now follows the letter, though not the spirit, of our non-democratic constitution.

Today, we are accustomed to thinking of democracy and dictatorship as our only alternatives, and democracy as obviously the better of the two. Most of the Western intellectual tradition has considered democracy to be unsatisfactory, however, because it has believed that we should be governed by virtuous people, and that most people are not virtuous. As Anthony Arblaster explains:

For most of its long history, from the classical Greeks to the present day, democracy was seen by the enlightened and educated as one of the worst types of government and

19 CB Macpherson, *The Real World of Democracy* (Oxford: Clarendon Press, 1966), pages 1-2.

20 John Adams, *The Works of John Adams, Second President of the United States*, ed. by Charles Francis Adams (Boston: Charles C Little and James Brown, 1850), Volume VI, page 484.

society imaginable. It was more or less synonymous with ‘the rule of the mob’ and that was, by definition, a threat to all the central values of a civilized and orderly society.²¹

In our present age of ethical relativism, it is considered inappropriate to suggest that some people are more virtuous than others. Therefore, democracy may be the best we can realistically hope for today. But we should at least understand that there are many species of democracy: direct and representative democracy, parliamentary and presidential democracy, liberal democracy, social democracy, communist democracy, revolutionary democracy, anarchist democracy, participatory democracy, deliberative democracy, consensus democracy, non-partisan, one-party and multi-party democracy, Christian democracy, Islamic democracy, etc. We should not assume that ‘democracy’ is a univocal term. If we decide to be democratic, we need to work out a form of African democracy appropriate for Kenyan cultures. But we should never forget that democracy without the rule of law is the tyranny of the majority.

The tendency of Western democracy, both liberal and social, is towards democratic centralism.²² The European Union and the euro are examples of this trend. The history of the USA has seen an increase in the power of the central government relative to the state governments. Kenyan governmental power is also highly centralised. Officials at the provincial and district levels are little more than administrators of the decisions of the central government. A survey conducted in December 2007 found that 60% of Kenyans believe that “the central government has too much power”.²³ If Kenyan governance institutions were less centralised, winning the presidential election would not be so important. As William H. Riker puts it, “Federalism is one way to solve the problem of enlarging governments – a problem that is one of the most pressing political concerns in the modern world.”²⁴

Julius Nyerere once said: “We, in Africa, have no more need of being ‘converted’ to socialism than we have of being ‘taught’ democracy. Both are rooted

21 Anthony Arblaster, *Democracy* (Minneapolis: University of Minnesota Press, 1987), page 6.

22 The phrase belongs to Vladimir Ilyich Lenin, “The Conditions of Affiliation to the Communist International” (July 1920), in *The Lenin Reader: The Outstanding Works of V I Lenin*, ed. Stefan T Possony (Chicago: Henry Regnery, 1966), page 340: “The parties affiliated to the Communist International must be built up on the principle of democratic centralism. In the present epoch of acute civil war, the Communist party will be able to perform its duty only if it is organized in the most centralized manner”.

23 Michael Bratton and Mwangi S Kimenyi, “Voting in Kenya: Putting Ethnicity in Perspective”, Afro barometer Working Paper number 95, March 2008.

24 William H Riker, *Federalism: Origin, Operation, Significance* (Boston and Toronto: Little, Brown and Company, 1964), page 2.

in our own past—in the traditional society which produced us.”²⁵ It is certainly true that a certain kind of what might be called ‘socialism’ and a certain kind of democracy did in fact exist in the traditional societies of eastern Africa. But they were small-scale ‘socialism’ and democracy. I believe that Tanzania’s experiment in *ujamaa* or African socialism was only partially successful because it tried to transfer what worked in the traditional African village to a nation of several million citizens. There is a vast difference between the small communities of traditional African societies and modern, Marxist socialism. What is needed is federalism, a hierarchy of communities. In the words of Arblaster, “From a democratic point-of-view it is not self-evident ... that central government decisions, supported in principle by a majority of the national population, should invariably override local majorities.”²⁶

V. CONCLUSION

This is the philosophy. The challenge is to put it into practice and that cannot be accomplished by non-Kenyans such as myself, because, in addition to practical wisdom, it requires intimate knowledge of Kenya’s cultures. We need to meet the challenge of developing culturally-appropriate governance institutions. The place to begin is the philosophy of traditional African cultures. And this is a challenge that can be met only by African intellectual leaders.

25 Julius Kambarage Nyerere, “Ujamaa: The Basis of African Socialism” (1962), in *Ujamaa: Essays on Socialism* (Dar es Salaam: Oxford University Press, 1968), page 12.

26 Arblaster, *Democracy*, page 72.

ETHICS OF THE RULE OF LAW: IMPUNITY, PUBLIC PERCEPTIONS OF JUSTICE AND GOVERNANCE IN KENYA

Migai Akech

I. INTRODUCTION

A key feature of public and private life in Kenya in the recent past is the disturbing ubiquity of disrespect for societal norms or rules of behaviour. Perhaps the best illustration of this emerging trend is to be found in the attitude of many public and private actors that they are not subject to societal norms and laws, and can do what they want and in any manner they deem fit. In Nairobi for instance, this attitude can be observed on the roads, where motorists and pedestrians alike simply ignore traffic laws and regulations. This lack of respect for societal norms and laws is creating a “culture of impunity” that is the very antithesis of law and societal order. Numerous commentators in newspaper articles and television programs have lamented this troubling culture of impunity.

Indeed, this emerging culture of impunity may have been a significant contributory factor to the generation and magnitude of violence that the country experienced following the announcement of the result of the highly contested presidential election in December 2007. Inquiries into the post-election violence indicate that both public actors (including public security forces) and private actors acted with impunity in many cases.¹ Kenya must therefore address this problem if it is to govern itself better. Respect for the norms and laws of society are a prerequisite for development, and the country cannot realize its “Vision 2030” unless it deals comprehensively with the culture of impunity.

This paper examines how law and its processes, and public perceptions of whether governmental entities and officials follow the law, might have contributed to the development of this worrying culture of impunity. And if law and its dispute resolution processes have contributed to public perceptions of injustice, can legal reform engender a culture of respect for the institution of law? Further, what legal reforms will engender the much-needed respect for the institution of law? Using examples of governmental failure or choice to disobey law, and key judicial decisions as illustrations, the paper makes the claim that Kenya has developed a culture of impunity partly because the “formal law”² is largely used by the political

1 See Republic of Kenya, Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (2008).

2 I use the term “formal law” to mean “rules that are readily observable through written documents” and “informal law” to mean “rules based on implicit understandings, being in most part socially derived.” See Todd R. Senger, Sergio Lazzarini and Laura Poppo, ‘Informal and Formal Organization in New

and economic elite to pursue narrow interests, and often at the expense of rationality, fairness and reasonableness. Thus the formal legal system often and increasingly produces absurd results. Those who use the law in this manner often do so at the behest of lawyers, who hardly ever stop to ponder whether their parochial use of law may be doing lasting damage to public respect for law and legal institutions.

Further, the paper claims that this unethical use of law makes it less appealing to the excluded majority as a mechanism for dispute resolution; the excluded majority then resort to non-legal mechanisms, which they perceive to be more just and therefore more legitimate. Indeed, for the ordinary citizen “doing the right thing” may become even more arduous when they see the rich and powerful abuse the law with impunity. The perception that law is an instrument for the elite may also have led the excluded majority not to demand accountability from the Judiciary for the outcomes of disputes that are in the public interest, such as the mega-corruption scandals. The development of the culture of impunity should thus be seen as the result of institutional decay occasioned by widespread lack of respect for the authority of law.

Kenya is in this unfortunate situation because law continues to be promulgated and applied without a critical appreciation of the context in which it operates. In addition, the formal law remains alien for the ordinary citizen, who cannot therefore use it as a meaningful instrument for holding his or her fellow citizens to account where they behave contrary to societal norms. The paper calls for a major rethink of how and what law is taught, so that future generations of Kenyan lawyers can better appreciate the ethics of the rule of law and their moral obligations to society. It also calls for a review of the language and substance of the formal law and its integration with the “living law,” so that law can be accessible to the majority of the citizenry and become an instrument that they can readily use to hold one another to account. Ultimately, the paper calls for the reform of law and legal processes so that, at the very least, they can promise justice. By promising justice, the law and legal processes will promote respect for the institution of law since the citizenry will be encouraged to adhere to law and resolve their disputes through law.

Part II provides the paper’s conceptual framework and argues that without ethics, the rule of law is an empty vessel that cannot form a suitable foundation for good governance. Part III reviews instances where governmental entities and officials have not respected the law, or used law in instrumental ways that do not

necessarily serve the public interest. This Part makes a number of claims. First, since government is the custodian of law, it would be asking too much to expect the citizenry to respect the law where the government does not do so. Second, because critical decisions of the courts may not have provided justice in significant instances, the citizenry have an incentive to resolve their disputes elsewhere. More importantly, perhaps, this lack of faith in the fairness of judicial dispute resolution provides a strong motivation for the citizenry to act with impunity in their quest for justice whenever they perceive they have been wronged by fellow citizens. Part IV grapples with how law and its processes can be reformed so that they can, at the very least, promise justice. Quite apart from the need to reform how law is taught and practiced, the paper calls for judicial reforms that will enhance perceptions of fair dispute resolution among the citizenry. Above all, the paper sees the reform of administrative law as being critical to making law promise justice. In calling for these reforms, the paper also appreciates the limits of law, and contends that Kenyans need to examine whether there has been an erosion of good cultural and other ethical practices that may be contributing to the entrenchment of the culture of impunity. Part V concludes.

II. THE RULE OF LAW, ETHICS AND GOVERNANCE

If we are to appreciate the nature of the “rule of law,” we need to grapple with the concept of law. What exactly is law? Despite decades of theorizing, legal philosophers are yet to agree on what law is. Thus HLA Hart observed that “Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question “What is Law?”³ To give a few examples, Plato defines law as “a form of social control, and instrument of the good life”; Aquinas defines it as “an ordinance of reason for the common good, made by him who has care of the community, and promulgates it”; Hobbes defines it as “the command of the sovereign;” Roscoe Pound defines it as “social control in a politically organized society”; Lon Fuller defines law as “the subjecting of human conduct to the governance of rules,” while for Hart law “consists of primary rules that apply to social conduct, and secondary rules that legal officials follow to recognize, change, and apply the primary rules.”⁴

3 HLA Hart, *The Concept of Law*, 1 (Oxford: Clarendon Press, 1961).

4 Huntington Cairns, *Legal Philosophy from Plato to Hegel*, (Baltimore: John Hopkins Press, 1949); Brian Z Tamanaha, ‘An Analytical Map of Social Scientific Approaches to the Concept of Law’, *Oxford Journal of Legal Studies*, 15, 501 (1995).

But while legal philosophers differ over what law is, they all appreciate its “vital importance to individuals and society.”⁵ In particular, law is a vital instrument for governance, which may be defined as the manner in which people are ruled and the affairs of the society administered and regulated. Law is vital for governance because it performs three important functions in society.⁶ First, law functions to maintain order. It is for this reason that Ehrlich talks of law as “an ordering.”⁷ From this perspective, it becomes important to conceive law broadly to include “the “concrete usages” or social practices, the rules of conduct that people actually follow within social groups,”⁸ and not just limit the remit of law to that which is written in statutes or regulations. Ehrlich terms such concrete usages and social practices the “living law.”⁹ This living law is important for good governance because “Normative ordering within social groups is maintained not primarily by the threat of coercive sanctions, but through reciprocity, mutual interest, the fixity of ongoing relationships, and habit.”¹⁰ Accordingly, the customs of a society and its ethical practices such as etiquette, morals, and religious practices should be viewed as part of that society’s living law. These ethical practices are concerned with “rational deliberation about questions of right and wrong.”¹¹

A typical objection to the inclusion of such customs and ethical practices in the conceptualization of law is that law then becomes so broad as to be vague. For legal positivists, for example, there must be something that distinguishes law from other normative orders in society, such as culture and ethics. It is in this respect that the second function of law, namely, that law serves to provide “institutionalized responses to violations of norms or to disputes,”¹² becomes important. On this understanding, what then distinguishes law from custom and morality is that “it is an institutionalized apparatus that makes a superior claim to maintain normative order through the application of physical force within a territory.”¹³

5 Brian Tamanaha, ‘Law,’ St. John’s University School of Law, Legal Studies Research Paper #08-0095 (2008) page 2 (unpublished).

6 Brian Tamanaha, ‘Law,’ 6-11.

7 Eugene Ehrlich, *The Fundamental Principles of the Sociology of Law*, 24 (New York: Arno Press, 1975).

8 Brian Tamanaha, ‘Law,’ page 7.

9 Eugene Ehrlich, page 497.

10 Brian Tamanaha, ‘Law,’ page 7.

11 Stephen L. Pepper, ‘Lawyers’ Ethics in the Gap of Law and Justice’, 40, *South Texas Law Review* 181, page 201 (1999).

12 Brian Tamanaha, ‘Law,’ page 8.

13 Brian Tamanaha, ‘Law,’ page 9.

While the idea that law needs institutionalization and power to enforce societal norms is an important attribute of the enterprise of law, it needs to be appreciated that law may not be a legitimate guide for human conduct if it is not embraced by members of society, or if its power of enforcement is not exercised in a manner that gives it legitimacy in the perceptions of members of society. As Brian Tamanaha has observed, “When law is characterized solely in terms of institutionalized norm enforcement, it amounts to coercive power, to oppression, exploitation or gang rule.”¹⁴ For these reasons, justice – which denotes “what is right, fair, appropriate or deserved” in social relations – ought to be a concern of law. The trouble with this conceptualization of law, however, is that there is little agreement on what justice means. For example, some people see justice as “right reason reflected in a just legal order, some as furthering the common good, and some as a divine order or the natural order of the universe.”¹⁵ Difficult questions arise, such as what kinds of justice and whose justice should law provide or guarantee in a given situation.

Because of disagreements about justice, it is difficult to say that law should necessarily be just. Nevertheless, a less controversial but significant claim can still be made that law should at least promise justice. Law promises justice by establishing procedures and processes that will ensure that our claims are treated in the same manner as others who have similar claims.¹⁶ As DJ Galligan has observed, “If justice is the first virtue of law and politics, then procedural justice is an essential element in its attainment.”¹⁷ Procedures are therefore instruments of justice since they facilitate the treatment of individuals “in accordance with the standards which govern the life of the society.”¹⁸ The idea is that substantive justice will be the product of consistently applied “impeccable method.”¹⁹ We can then claim that a third function of law is to promise justice. This may explain why there are symbols of justice in our legal institutions. Thus Parliament declares its purpose to be “for

14 BrianTamanaha, ‘Law,’ page 10.

15 Tamanaha, ‘Law,’ page 10.

16 DJ Galligan, *Due Process And Fair Procedures: A Study of Administrative Procedures*, 17 (Oxford: Clarendon Press, 1996) (Observing that “If the criminal law is to be enforced, if the legal standards regulating and directing an array of activities are to be upheld, if burdens and benefits are to be distributed in accordance with binding norms, and if disputes between parties are to be resolved, then procedures appropriate to each of those tasks must be available”).

17 Galligan, page xvii.

18 Galligan, page xvii.

19 Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, 67, (New York: Harper and Row, 1978).

the just government of men,” while we refer to our judges as “justices.” And the Law Society of Kenya uses the scales of justice as its logo.

The claim that law promises justice is perhaps best captured in the idea of the Rule of Law. We should appreciate that the Rule of Law is an ideal, and one that is almost utopic. The essence of the Rule of Law ideal is that “people ought to be governed by law.”²⁰ For this goal of “government by law, not by men” to be realized, the Rule of Law ideal requires the establishment of laws that meet a number of criteria.²¹ First, the law must be universal or general, in the sense that its prescriptions must be addressed to citizens generally as opposed to particular individuals. Second, the law must be promulgated to its subjects, whose conduct can only be guided by the law if they know of its existence. Third, the law must prescribe modes of behaviour prospectively and not retroactively. Fourth, the prescriptions of law must be clear so that its subjects understand how they are required to behave. Fifth, the prescriptions of law must not be contradictory. Sixth, the prescriptions of law must not require conduct that is impossible for the subjects to perform. Seventh, the prescriptions of law must be stable over time. That is, while changes in the law are a good thing, such changes must not be too frequent since many of the actions that law seeks to regulate “require advance planning, preparations and a certain level of guaranteed expectations about the future normative environment.”²² Finally, the prescriptions of law must be applied consistently, in the sense that there must be “considerable congruence between the rules promulgated and their actual application to specific cases.”²³ This criterion of the Rule of Law is particularly important, as it implicates the day-to-day and practical application of law. For it to be realized, there must be suitable “application mechanisms,” including an independent and professional judiciary, easy access to litigation, and reliable enforcement agencies.”²⁴

Where these criteria of the law are observed on a day-to-day basis, law’s promise of justice can be attained. But where they are not observed, this promise is unlikely to be realized. A question then arises as to why the above noble criteria of the Rule of Law may not be observed. In this regard, the Rule of Law should be seen as an empty vessel that can be filled with ethically good or bad laws. In order

20 Andrei Marmor, ‘The Rule of Law and Its Limits’, (University of Southern California Law School, Public Policy Research Paper number 03-16 (2003) (unpublished) (page 2).

21 These criteria of the rule of law are drawn from Marmor.

22 Marmor, page 8.

23 Marmor, page 8.

24 Marmor, page 8.

for law's promise of justice to be attained, the Rule of Law vessel needs to be filled by the values of a society, including its customs, culture, morality and religion. Looking at the rule of law from the perspective of the law's first function discussed above, it then becomes important to appreciate that normative ordering in any given society works best where there is a desire among its members to observe the rules and consider it to be in their interests to do so. Law therefore claims and attains authority not primarily because it is backed by threats of punishment against those who do not abide by its prescriptions, but because it commands the respect of the members of society. In any case, threats of coercion do not work particularly well where lack of respect for law is widespread. In such cases, the coercive apparatus of the State is often stretched beyond capacity, and anarchy tends to take over.

In this regard, it is also important to see the rule of law as a culture that mandates adherence to procedures and processes. Typically, law achieves its results by establishing the procedures and processes that need to be followed by the persons to whom it is addressed. For example, whenever Parliament proposes to make new laws, the culture of legality requires it to follow certain uniform procedures. Similarly, the police are required to adhere to certain procedures in conducting their investigations and prosecuting accused persons. And in order to facilitate order on the roads, motorists and pedestrians are required by law to observe "the rules of the road" whether or not someone is watching over them. Accordingly, procedures and processes facilitate the proper and uniform application of law, so that, for example, its prescriptions may be predictable and stable over time.²⁵ More significantly perhaps, consistent procedures and processes preclude anarchy, which is the very antithesis of rule of law. Thus if Parliament does not follow its own law-making procedures, then social ills such as corruption are encouraged. Likewise, if motorists and pedestrians do not follow the rules of the road, then chaos will take over our roads. And whenever rules are not applied consistently, people begin to lose faith in their normative character or ability to regulate behaviour. The cumulative effect of such lack of a culture of respect for the rule of law is that a culture of lawlessness begins to be entrenched in society. Thus while the culture of legality may not always produce justice, it is an important attribute of the rule of law in so far as it facilitates fidelity to law.

Conversely, it also needs to be appreciated that dogmatic adherence to the dictates of law is equally undesirable. In particular, society should not be held

25 Galligan, page 5.

captive by rules of procedure which hinder the attainment of justice. There is thus a need to constantly review rules of procedure to ensure that they lead to desired outcomes, and do so in a way which is not only efficient but also fair.²⁶ Again, where people begin to perceive legal procedures and processes as being too rigid, they begin to lose faith in the law.

In either *scenario*, therefore, the law must inspire the confidence of the citizenry. As DJ Galligan has observed, “Confidence that the law has been properly applied or a discretion reasonably exercised, depends to a significant degree on confidence in the procedures as the means to those outcomes.”²⁷ For Galligan, confidence is fundamental to the institution of law since “legal processes are social processes where the object is to reach a sound practical judgment about a matter in issue; a sound practical judgment for its part is one which can be explained and which can be seen to be rational and reasonable, so that at the end we have a confidence in it.”²⁸ The significance of public confidence in the law is also captured in the oft-cited expression that “justice should not only be done, but should manifestly and undoubtedly be seen to be done.”²⁹ A basic idea behind this expression is that established procedures, which have been tried and tested sufficiently, form a practical guide for the public to determine whether “the right or best outcome has been reached and justice actually done” in the particular case.³⁰

We also need to appreciate that the Rule of Law ideal largely perceives law as a body of neutral rules. But in doing so, it fails to address a number of fundamental questions. For instance who makes the prescriptions of law? Is the process of making law inclusive or participatory and to what extent? How is the polity in question organized? How accessible are the political processes in the polity? What are the political power and economic resource dynamics in the polity? Where are the judges and arbiters of the rules of law drawn from and what are their ideological predispositions? What role does the political process play in the appointment of these judges and arbiters? All these substantive questions have a bearing on the supply and demand of the Rule of Law. It is therefore important to investigate whether and how the Rule of Law ideal “fits in different political, social, and institutional contexts.”³¹

26 Galligan, page 6.

27 Galligan, page 66.

28 Galligan, page 66.

29 *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256.

30 Galligan, page 72.

31 Frank Upham, ‘Mythmaking in the Rule of Law Orthodoxy’, Carnegie Endowment for International

In real life, far from being a body of neutral rules, law is often a means that the rich and the powerful use to achieve their ends, irrespective of whether such instrumental use of law produces injustice. Thus lawyers are said to “manipulate or utilize legal rules and processes to achieve the ends of their clients.”³² Again, it is said that judges also “reason instrumentally to lead to particular outcomes when deciding cases.”³³ In addition, students of law in common law jurisdictions are taught to view law instrumentally.³⁴ Thus law students are “expected and even encouraged to exploit every loophole in the rules, take advantage of every one of their opponents’ tactical mistakes or oversights, and stretch every legal or factual interpretation to favour their clients.”³⁵ The ends therefore justify the means.

It is inevitable that the prescriptions of law will not be precise in many cases.³⁶ We do not always agree on the objectives of legislation, and written laws are therefore invariably the result of a process of negotiation, if not horse-trading. Novel situations may also call for the creative interpretation of existing prescriptions of law. This means that the laws made by Parliament typically call for interpretation by administrators and courts of law, who therefore have wide discretionary powers in many cases. For example, the Constitution of the Republic of Kenya requires that any person who is accused of a criminal offence must be tried “within a reasonable time.”³⁷ It is such vague legal prescriptions that allow lawyers and judges to apply law instrumentally. But the application of law in this manner is detrimental to “the binding quality of the rule of law.”³⁸ Especially in deeply divided societies where people see law in different ways, the susceptibility of the prescriptions of law to instrumentalism may serve to undermine the authority and legitimacy of law.³⁹ In such societies, Brian Tamanaha contends that “legal decisions will be increasingly fused with political disputes, will increasingly be based upon political judgments, and will increasingly be determined according to the political predispositions of the judges,” and that “As a consequence of judges

Peace (CEIP), Democracy and Rule of Law Project, Working Paper number 30 (CEIP, 2002) page 8.

32 Brian Z. Tamanaha, ‘*The Tension between Legal Instrumentalism and the Rule of Law*’, *Syracuse Journal of International Law and Commerce*, 33, 131 (2005).

33 Tamanaha, ‘*Tension between Legal Instrumentalism and Rule of Law*’, page 131.

34 Tamanaha, ‘*Tension between Legal Instrumentalism and Rule of Law*’, page 145.

35 Tamanaha, ‘*Tension between Legal Instrumentalism and Rule of Law*’, pages 146-147.

36 Timothy A.O Endicott, ‘*The Impossibility of the Rule of Law*’, 19 *Oxford Journal of Legal Studies*, 19, 1, page 5 (1999) (Observing that “vague language is a pervasive legislative tool.”)

37 Constitution of the Republic of Kenya, section 77(1).

38 Tamanaha, ‘*Tension between Legal Instrumentalism and the Rule of Law*’, page 152.

39 Tamanaha, ‘*Tension between Legal Instrumentalism and Rule of Law*’, page 153.

making what appear to be political rather than legal decisions, political fights will increasingly break out over who will become judges.”⁴⁰

How, then, can society guard against unbridled resort to instrumentalism? If vague law is to be applied consistently, there must be suitable “application mechanisms” including an independent and professional judiciary, easy access to litigation and reliable enforcement agencies.⁴¹ More importantly, perhaps, all groups in society need to be accorded sufficient resources to enable them participate in the game of interpreting law. In doing so, we need to appreciate that many social, political, and economic battles are fought over and through law, which is therefore a heavily contested terrain.⁴² Where this latter condition is not met, it is easy to see why the rich and the powerful will have better access to the Rule of Law. Last but not least, it is important for lawyers, judges and administrators who have the duty of interpreting law to adopt a culture of fidelity to law so that they appreciate that the instrumental application of law may be detrimental to the law’s claim to authority and legitimacy.⁴³ They need to appreciate that where, as in deeply divided societies, the instrumental use of law favours one interest group’s claim at the expense of another group, the binding authority of law may be severely undermined. So that as they interpret law, they need to ask themselves what impact their interpretation will have on society’s perception of, and respect for, law. A culture of restraint in the interpretation of law that takes into account the prevailing social, cultural, economic and political circumstances of a society is therefore required if a society is to have a meaningful Rule of Law.

The upshot of the foregoing discussion is that we must not be overly preoccupied with whether or not a legal system conforms to the formal criteria of the Rule of Law. Instead, what should matter is that the social, cultural, political

40 Tamanaha, ‘*Tension between Legal Instrumentalism and Rule of Law*,’ page 153.

41 Marmor, page 8.

42 In the United States, for example, Brian Tamanaha has given excellent examples of societal contests through law. He writes that in the United States the contest over and through law includes “systematic efforts to control and wield the law: through careful ideological screening of prospective judges; by funnelling huge sums to pliable legislators who will enact desired legislation; by securing the appointment of lobbyists to administrative positions who will then implement favourable regulatory regimes and actions; by staffing law enforcement agencies like the Justice Department with ideologically motivated individuals; by aggressively bringing provocative law suits before judges perceived as friendly to the same ends. See Brian Tamanaha, ‘On the Instrumental View of Law in American Legal Culture,’ (St John’s University School of Law, Legal Studies Research Paper Series, Paper #08-0143 (2008)(unpublished) (page 7).

43 Tamanaha, ‘*Tension Between Legal Instrumentalism and the Rule of Law*,’ page 154 (Observing that “The most important ingredient for the rule of law to function is that lawyers and judges, in particular, must be imbued with the belief that at their core legal rules have a binding component”. (Emphasis Mine).

and economic context prevailing in a society facilitates the ethical utilization of the prescriptions of law to provide justice or fairness for all. Such an outcome would bode well for the legal system, as it would further its legitimacy in the perceptions of the citizenry. But where the instrument of law is controlled by a few and is inaccessible to a sizable segment of the citizenry, it is unlikely that law will be perceived as a legitimate instrument for the governance of society. And where the citizenry perceive the law to be illegitimate or irrelevant, they are likely to resolve their disputes or manage their affairs outside the established formal legal system. A legal system must therefore inspire the confidence of the citizenry, otherwise it will become irrelevant.

Ethics therefore matters a great deal in the establishment of laws that the citizenry can respect and use as a guide for their day-to-day conduct. The citizenry must be able to see law as a product of their “ideas and activities” if it is to command their respect.⁴⁴ In such circumstances, the citizenry are arguably more likely to follow the law even if it does not produce favourable outcomes in particular instances. This is the kind of culture that fidelity to law requires. Ethics also matters a great deal because, and as we have seen, discretion cannot be eliminated from law. Indeed, it would be undesirable to eliminate all discretion from law since that would render it unduly formalistic and incapable of resolving novel challenges as and when they arise.⁴⁵ But such discretion ought to be applied consistently and in a manner that ensures that the outcomes of discretionary decisions or judgments are perceived by the citizenry to be authoritative and legitimate. Ethical or fair use of the discretionary powers granted by law is therefore a prerequisite for the attainment of a substantive rule of law. By demanding the consistent and ethical use of discretionary powers, we would be minimizing the vagueness of legal prescriptions, thereby enhancing respect for the rule of law.⁴⁶

III. LAW, PERCEPTIONS OF JUSTICE AND GOVERNANCE

Do public perceptions of how government entities use law, and how courts and other dispute resolution institutions apply and interpret law impact on the rule of law and governance? If so, how is this impact manifested? This Part grapples with these important questions, and speculates on whether governmental disrespect for

44 Tamanaha, ‘Law,’ page 131.

45 Endicott, page 9.

46 Endicott, page 7 (Noting that the ideal of the rule of law includes “*a commitment to minimize vagueness.*”) [emphasis mine].

law and critical decisions of Kenyan courts may be influencing public perceptions of justice. Three critical claims are made. First, since government is the custodian of law, it would be incredulous to expect the citizenry to respect the law where the government does not do so. Second, because decisions of the courts have probably not provided justice in significant instances, the citizenry have an incentive to resolve their disputes elsewhere. Further, it is argued that this resulting lack of faith in the fairness of judicial dispute resolution provides a strong motivation for the citizenry to act with impunity in their quest for justice whenever they perceive they have been wronged by fellow citizens.

In many ways, this line of inquiry constitutes a foray into the terrain of sociology and psychology. Because the law's authority depends a great deal on its ability to inspire public confidence, it makes logical sense to inquire into the sociology, or psychology, or social psychology, of law and justice. Inquiries of this nature are quite rare, if not absent altogether in Kenya. In my view, such inquiries would contribute immensely to our understanding of why a culture of impunity is rapidly developing in Kenya.

In societies where such inquiries have been made, such as the United States of America, researchers seek, among other things, to explain how individuals' perceptions of the fairness of legal procedures and processes, and the fairness of the outcomes of such procedures and processes, impact on their respect for the authority of law.⁴⁷ One of the interesting findings of these inquiries is that "once people have established fairness judgments (either procedural or distributive fairness), perceived fairness serves as a heuristic that guides the evaluation of subsequent events."⁴⁸ In other words, once people perceive the law to be generally fair, they are likely to accept the law's authoritativeness in subsequent encounters even on the odd occasions when it is not fair in their eyes. The obverse is also true.

Let me now examine how our governmental entities and public officials treat law, and review some critical decisions of Kenyan courts in the areas of corruption and criminal justice, as I muse on how these decisions might be colouring public perceptions of the authority of law. Ultimately, there is a need for empirical research on whether and how judicial decisions, and the use of legal procedures and processes by governmental entities and public officials, impact on public

47 Kees van den Bos, et al, 'How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect', *Journal Of Personality And Social Psychology* 72, 1034 (1997); E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988); Paul G Chevigny, 'Fairness and Participation', *New York University Law Review* 64, 1211 (1989) (Book Review).

48 Van Den Bos, page 1035.

perceptions of justice and/or contribute to the development of a culture of impunity.

A. Does Government Respect Law?

Successive governments in Kenya have not always adhered to the prescriptions of law, especially where legal requirements are seen to be a hindrance to the attainment of short-term political or other ends. Whenever this happens, the message that government sends to the citizenry is that law does not really matter and can be dispensed with whenever it is convenient to do so. Again, it should be noted that whereas it is the Executive branch of government that is typically notorious for not respecting the law, Parliament and the Judiciary also and increasingly display lack of respect for law in significant ways. The consequence of governmental disregard for law is that law ceases to be authoritative, and a culture of impunity and lawlessness begins to emerge. Let us now see how governmental entities have disregarded the dictates of law.

For the most part, the Executive has only obeyed law where it is politically expedient to do so. Conversely, the Executive has consistently, and in some cases contemptuously, disregarded the provisions of law where these are perceived to be politically inconvenient. For example, the coming into force of certain laws assented to by the President as required by the Constitution but deemed not to accord with the interests of the Executive have been delayed. The Executive has also selectively applied the law, with the result that the idea of “equality before the law” is greatly undermined. This failure to apply the law consistently has particularly been pronounced in grand corruption investigations, where conspiracies among Executive agencies has encouraged inaction as the responsible agencies of government engage in turf wars that only result in the law not being applied. Such conspiracies by the Executive to undermine the rule of law do not engender public confidence in the fairness of the law as petty corruption investigations, which are invariably taken to their logical conclusion, are seen to be treated differently. The Executive also stands accused of abusing “the spirit of the law” through dogmatic adherence to “the letter of the law” where fairness demands a common sense approach to the issues at hand. This has particularly been the case with matters relating to the electoral process. The Executive has also been adept at using the legal framework governing commissions of inquiry to achieve political goals, often to the detriment of the need for consistent application of the prescriptions of law. Let us now examine each of these instances of executive disregard for the rule of law.

A key tenet of the rule of law is that “government discretion must be bounded by standards that set effective limits on the exercise of that discretion.”⁴⁹ Unfortunately in Kenya’s case, the exercise of the immense discretionary powers wielded by the Executive, especially the President, has not been fettered by any such standards. As a result, the President, Government Ministers and other officials of the Executive vested with discretionary powers act in any manner they deem fit, and in many cases irrespective of existing statutory requirements. There is thus a worrying culture of Executive impunity in Kenya.

This culture of Executive Impunity has manifested itself in various forms throughout the history of the Republic of Kenya, and is a common subject of discussion in national newspapers.⁵⁰ In all its forms, what typically happens is that the Executive protagonist in question acts in total disregard of the existing statutory requirements in the comfortable knowledge that his or her actions will not be subjected to any sanctions, since the established public accountability mechanisms are weak. Executive actors also tend to stretch the boundaries of their statutory powers, so that in practice that which is not expressly outlawed by any statute implicitly becomes permissible – at least in their eyes. As far as these Executive actors are concerned, the law seems to count for little; in many cases they perceive law as an inconvenience that must be put aside when political exigencies demand. Ironically, they are quick to embrace the rule of law when it suits their fancy.

The following examples should suffice to illustrate how this culture of impunity is manifested. First, government ministers constantly display contemptuous disregard for established rules and procedures in public procurement matters. Although the legislative framework for public procurement does not give government ministers, other than the Minister for Finance, any role in the public procurement process, they have nevertheless intervened and influenced the award of tenders.⁵¹ These Government Ministers simply have no regard for the established rules and procedures and typically use their “residual powers,” such as the power to suspend or dismiss public officers, to manipulate public procurement processes. They are able to intimidate public officers in this manner because there is no fair legislative framework that regulates the public service. Instead, the public service is

49 William C Whitford, ‘The Rule of Law’, *Wisconsin Law Review* 723, page 724 (2000).

50 Dominic Odipo, ‘We Cannot Let Ministers Break Laws unpunished’, *East African Standard*, 30 June 2008, page 8; Edward Kolla Wangila, ‘Impunity at the Top is Kenya’s Undoing’, *Saturday Nation*, 5 July 2008, page 11.

51 See JM Migai Akech, ‘Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid,’ *New York University Journal of International Law and Politics*, 37, 829 (2005).

only regulated by an administrative Code of Regulations that does not establish procedures and processes that would ensure fair treatment of public officers where they are confronted with concerted intimidation by powerful Government Ministers or other senior officials.⁵² The threat of being suspended or dismissed is therefore real and has in many cases intimidated public officers into obeying illegal ministerial directives.

It should also be observed that these threats are typically dispensed in the name of the President or his close associates. Again, these threats are never expressed in writing, which makes it difficult for threatened public officers to prove that they were ever made. Where government ministers want to manipulate the public procurement process, they typically use such residual powers to demand information from the public officers handling the process. They then use such information to facilitate the award of tenders to entities of their choice.⁵³

This contemptuous disregard for public procurement rules and procedures continues unabated, and is arguably the most important source of corruption in Kenya. Despite the glaring manipulation of these rules and procedures by a number of government ministers, none of them has been censured appropriately, which seems to encourage the entrenchment of the culture of disrespect for established laws and procedures. Thus the ministers who presided over the Anglo Leasing scandal in Kenya were welcomed back to the Cabinet after a brief sojourn that now seems to have been merely calculated to cool public tempers. Conversely, the careers of the public officers who carried out the instructions of the Ministers in question were brought to a premature halt. Whereas these public officers were not necessarily blameless, it is clear that there was no equal treatment of all the individuals involved in perpetrating this theft of public funds.

Second, the contemptuous disregard for rules and procedures by Government Ministers is displayed frequently in the context of contests for political power by political parties. In a more recent display calculated to influence the fortunes of the Party of National Unity (PNU) to which he is affiliated, a Minister for Local Government purported to gazette, as nominated councillors to local authorities, individuals whose names had not been forwarded to him by the Electoral

52 Republic of Kenya, Code of Regulations (2006).

53 See, e.g., CNC/ZTC/Kensim (*Taifacom Ltd*) v *Communications Commission of Kenya*, Application number 30 of 2004 (Public Procurement Complaints Review and Appeals Board, 5 August 2004; *Getrio Insurance Brokers Ltd* v *City Council of Nairobi*, Application number 23 of 2003, Public Procurement Complaints Review and Appeals Board, 6 August 2003.

Commission of Kenya (ECK), contrary to the clear provisions of the applicable laws.⁵⁴ In addition, the said Minister purported to decline to gazette individuals whose names had been forwarded by the ECK. In doing so, the Minister nominated about one hundred more councillors than the Local Government Act permits him to do. The Local Government Act provides that the number of nominated councillors in any local authority should not exceed one third of the elected councillors.⁵⁵

These irresponsible actions of the said Minister undermined the democratic process, and contributed significantly to the chaos that characterized mayoral elections in several cities and towns in February 2008. In Nairobi, for example, there was a farcical and acrimonious tie in the mayoral election that would not have occurred had the Government Minister in question followed the law.⁵⁶ This is a clear example of a Government Minister purporting to exercise powers that are not conferred upon him by any law. While his successor subsequently revoked the offensive Gazette Notice, this example demonstrates how the culture of impunity by power holders undermines the democratic process. Again, the Government Minister in question has not been censured for abuse of office.

Third, the culture of impunity is also evident in the treatment of the media by Government Ministers. Media houses and journalists critical of the Government have in some cases been dealt with in highly draconian ways. This practice is perhaps best illustrated by a raid on the Standard Newspapers and Kenya Television Network (KTN) in 2005 carried out by persons believed to have been acting on the instructions of senior Government officials. Here again, established legal rules and procedures for making complaints against the media were conveniently ignored. In the aftermath of the raid, an unapologetic Government Minister, while citing the preservation of state security as the reason for the raid, remarked that “If you rattle a snake, you must be prepared to be bitten by it.”⁵⁷ Quite clearly, this Government Minister was stating that the Government would deal ruthlessly with critical media houses, and would use illegal means if these were deemed to be appropriate in the circumstances. During the raid, the broadcasting equipment of the Standard Newspapers and KTN was disabled and its computers were vandalized. In addition, some of its employees were assaulted by the commandoes

54 See Kenya Gazette Notice number 1276 of 22 February 2008.

55 Local Government Act, section 31(i)(d), Chapter 265, Laws of Kenya.

56 See, e.g., Jim Onyango, ‘No Mayor for Nairobi Yet as Candidates Tie in Poll,’ *Business Daily*, 25 February 2008.

57 See, e.g., ‘Shameful Episodes of Arturs and Kibaki Men’s Blunders,’ *Daily Nation*, 27 December 2006.

who undertook the raid. The Government Minister in question was never censured for his callous and irresponsible remarks. Further, the public is yet to be informed of what transpired since a commission of inquiry established by the President to investigate the matter never made its report public. Despite taking the law into their hands, the commandoes who raided the Standard Newspapers and their accomplices escaped punishment for their crimes.

Fourth, Executive disrespect for the rule of law is manifested in the habit of the Executive of ignoring court orders. This has led some commentators to observe that there is a general perception among Kenyans that there is a “widespread culture of defiance of court order.”⁵⁸ Examples abound. In 2003, the then Minister for Tourism and Information defied a court injunction restraining the Government from taking over a building whose ownership was in dispute.⁵⁹ The same Government Minister subsequently defied a court order requiring him to disband a committee he had constituted to investigate the affairs of a radio station.⁶⁰ Again in 2003, the Minister for Local Government defied a court order which sought to prevent him from revoking the nomination of a councillor of the Mombasa City Council.⁶¹ In a repeat action, the same Minister defied a court order quashing the nomination of an individual to serve in the Kisumu City Council.⁶² No action was taken against these defiant Government Ministers.

Fifth, the Executive tends to apply law selectively, thereby undermining a key tenet of the rule of law that there ought to be consistent application of the prescriptions of law. The handling of corruption cases by the Kenya Anti Corruption Commission (KACC) and the Office of the Attorney General provides a good illustration of this phenomenon. Before outlining how these executive agencies apply law selectively, we need to appreciate the nature of their powers. The KACC’s primary mandate is to investigate matters that raise suspicion that conduct constituting corruption or economic crimes has taken place.⁶³ It is entirely up to the KACC to decide whether or not to investigate any matter. Because there are no objective standards regulating how this important decision should be made, the power to investigate is prone to abuse and can be subjective. Conversely, the

58 Winnie Mitullah, et al, *Kenya’s Democratisation: Gains or Losses?* 52-53 (Nairobi: Claripress, 2005).

59 Mitullah, et al, page 52.

60 Mitullah, et al, page 53.

61 Mitullah, et al, page 53.

62 Mitullah, et al, page 52.

63 Kenya Anti-Corruption and Economic Crimes Act, number 3 of 2003, section 7(1).

Constitution of the Republic of Kenya gives the Attorney-General the power to “institute and undertake criminal proceedings against any person before any court (other than a court-martial).”⁶⁴ Again, this power is apparently absolute and can be exercised by the Attorney-General “in any case in which he considers it desirable so to do.”⁶⁵ The Constitution does not establish any standards to regulate the exercise of this discretionary power.

In practice, what typically happens is that once the KACC has determined that conduct constituting corruption or economic crime has occurred, it refers the matter to the Attorney-General, who then makes a decision as to whether or not to prosecute the individuals or entities in question. This is the point at which politics invariably comes into play. In some cases, the Office of the Attorney-General proffers charges against the accused; in other cases it does not.⁶⁶ It is often unclear what criteria the Office of the Attorney General uses to determine which cases merit prosecution and which cases do not.

The Anglo-Leasing corruption scandal provides a good example. It involved the acquisition of tamper-proof passports by the Ministry of Home Affairs and the construction of forensic laboratories for the police force.⁶⁷ KACC investigated the matter, and recommended that the Attorney-General should prosecute certain public officers. But the Attorney-General declined to prosecute these public officers on the grounds that the KACC investigations were incomplete and had failed to disclose that any specific offences had been committed.⁶⁸ The Attorney-General then referred the matter back to the KACC for further investigations. The KACC then retorted that it had “offered watertight cases for prosecution.”⁶⁹ Hopefully, KACC is still conducting further investigations. The result of these inter-agency power games is a perennial merry-go-round that results in no charges ever being proffered against accused persons. Justice is thereby delayed, and

64 Constitution of the Republic of Kenya, section 26(3)(a).

65 Constitution of the Republic of Kenya, section 26(3).

66 See, e.g., Republic of Kenya, Report of the Judicial Commission of Inquiry into the Goldenberg Affair, paragraphs 769, 773, 777-779 (Observing how the Attorney-General's office would file and then withdraw criminal charges with respect to the Goldenberg corruption scandal in some cases, while proceeding with cases it had chosen to prosecute in a “most haphazard and lethargic fashion.” Further, the Commission observes that there were many delays in such cases, giving the accused persons the “perfect excuse” to file applications in court claiming that the delays had “prejudiced them and violated their constitutional rights.”)

67 See, e.g., ‘A Harvest of Corruption Scandals,’ *East African Standard*, 5 February 2005.

68 See, e.g., David Mugonyi and Lucas Barasa, ‘Furious Ringera Tells Attorney-General – Files are Complete,’ *Daily Nation*, 20 October 2006.

69 Mugonyi and Barasa.

inevitably denied. It is also quite possible that this merry-go-round is the result of collusion between the agencies whose motivation is to frustrate the legal process. Indeed, a government that is not keen on fighting corruption has an incentive to encourage such collusion. The net effect of the exercise of the combined discretionary powers of the KACC and the Attorney-General is that investigations and prosecutions in cases of corruption and economic crimes are in many cases perceived by the public to be “selective and discriminatory.”⁷⁰

In practice, it is therefore quite evident that only minor players are investigated and prosecuted by these government bodies, while the major players appear to be untouchable. Critics of the KACC thus maintain that it is yet to facilitate the prosecution a single high profile corruption case since it was established. For example, six years have gone by and none of the perpetrators of the Anglo-Leasing scandal have been brought to book.⁷¹

But it is not only the Executive who stands accused of treating the dictates of law with contempt. Parliament and the Judiciary also stand accused. Parliament’s disregard for the rule of law is, by way of example, manifested in its persistence in enacting laws that give Members of Parliament executive powers, contrary to the separation of powers doctrine. Two such laws have been enacted since 1999. These laws are the Kenya Roads Board (KRB) Act⁷² and the Constituency Development Fund (CDF) Act.⁷³

The KRB Act establishes the Kenya Roads Board to oversee the country’s road network and to oversee the maintenance, rehabilitation and development of roads.⁷⁴ More specifically for present purposes, the KRB Act establishes a “District Roads Committee” (DRC) for every district.⁷⁵ “All the Members of Parliament from the district” are members of this subsidiary Executive institution.⁷⁶ Shortly after this law was enacted, John Harun Mwau moved to court to challenge its constitutionality in the case of *Republic v Kenya Roads Board ex parte John Harun*

70 Gitobu Imanyara, *Systems and Structures Set up by the Government to Fight Corruption: How Effective and What More can be done?* in *Strengthening Judicial Reforms in Kenya Volume IX: The Anti-Corruption Court in Kenya* at 52 (Nairobi: International Commission of Jurists, 2004).

71 See, e.g., ‘A Harvest of Corruption Scandals.’

72 Kenya Roads Board Act, number 7 of 1999.

73 Constituency Development Fund Act, number 10 of 2003.

74 Kenya Roads Board Act, section 6(1).

75 Kenya Roads Board Act, section 17(1).

76 Kenya Roads Board Act, section 17(2)(b).

Mwau.⁷⁷ The applicant sought the judicial review order of prohibition to prevent the implementation of the KRB Act and a declaration that “it is unconstitutional as it confers executive powers on legislators contrary to the doctrine of separation of powers and that it is unconstitutional for the legislators to enact and enforce the laws.”⁷⁸ The Court obliged, observing that “it would be against the constitutional principle of separation of powers for members of Parliament to take part in actual spending, then submit their annual estimates to themselves in Parliament for approval, then query themselves through the Public Accounts Committee or the Public Investment Committee.”⁷⁹ But Parliament was unmoved. And the Executive chose to do nothing. The illegality therefore persists to date.

Emboldened by the powerlessness of the Judiciary and the acquiescence or indifference of the Executive in the case of the KRB Act, Parliament then enacted the CDF Act, which gives MPs even more powers. It should be noted at the outset that the CDF Act has noble objectives, as it seeks to enhance the participation of Kenyans in the initiation and implementation of development projects at the local level. But it violates the separation of powers doctrine in a number of respects. In particular, the CDF Act gives MPs the power to simultaneously expend public resources and account to Parliament for such expenditure. Two principal institutions of the CDF Act are important in this respect, namely the Constituency Development Committee (CDC) and the Constituency Fund Committee (CFC). The CDC is arguably the most critical institution of the CDF Act, without which the idea of devolution that informs the CDF initiative would not be realized. The Act requires the establishment of a CDC in every constituency. But this critical organ, whose functions are executive in nature, is constituted, convened and chaired by the MP.⁸⁰ And while the Act makes an attempt to regulate what kind of persons can serve as members of the CDC, the ultimate decision of which individuals are to be appointed thereto is the prerogative of the MP. In addition, the CDF Act gives MPs the power to identify the projects which are to be funded by the CDF.⁸¹ The CDF Act therefore makes the MP a grand political patron at the local level.

77 *Republic v Kenya Roads Board ex parte John Harun Mwau*, Nairobi High Court Miscellaneous civil application number 1372 of 2000.

78 *Republic v Kenya Roads Board ex parte Mwau*, page 2.

79 *Republic v Kenya Roads Board ex parte Mwau*, pages 30–31.

80 Constituency Development Fund Act, section 23(1).

81 Constituency Development Fund Act, section 12(1).

On the other hand, the CFC is an oversight body. It is established as a select committee of the National Assembly, and consists of “a chairman and not more than ten other members of Parliament who are not Ministers or Assistant Ministers of Government.”⁸² Its functions include overseeing the policy framework, the legislative framework, and the implementation of the CDF Act.⁸³ MPs therefore audit their work under the Act and account to themselves through the CFC.

In practice, MPs have not been transparent in exercising their powers under the CDF Act, and locations opposed to the MPs are bypassed and do not therefore benefit from the CDF.⁸⁴ The CDF Act has therefore enhanced sub-ethnic, regional and class differences.⁸⁵ Cases of misappropriation of funds and poor implementation of projects have also been reported.⁸⁶ The Act also undermines the democratic process by giving members of parliament exclusive control over a key local resource.

Above all, the CDF Act fuses legislative and executive powers thereby undermining the separation of powers doctrine. More particularly, the Act facilitates the arbitrary exercise of power by MPs, contrary to the tenets of the rule of law. In the nature of things, it is also unrealistic to expect that MPs will objectively oversee their own actions. The problematic nature of the CDF Act are perhaps best captured by a commentator who writes that “The scenario presented by the Act whereby the legislator makes a law... participates in implementing the law... and then accounts for the expenditure to Parliament (in this case to himself) throws democratic accountability overboard.”⁸⁷

The Judiciary has had occasion to review the Act in the case of *John Onyango Oyoo and others v Zadock Syongo and others*, where the applicants complained of inequitable distribution of the funds allocated to Gwasi Constituency. The Court noted that “there is no clear mechanism in the Act to control abuse or excessive use of authority by the sitting member of Parliament under the powers given to him under section 23 of the Act.”⁸⁸ In response to public outcry, Parliament also

82 Constituency Development Fund Act, section 27(1).

83 Constituency Development Fund Act, sections 27(4)(d) and (e).

84 Kenya Private Sector Alliance (KEPSA), Workshop Report on the Constituency Development Fund (2006) page 4.

85 KEPSA, page 4.

86 KEPSA, page 4.

87 KEPSA, page 22.

88 *John Onyango Oyoo and others v Zadock Syongo and others* [2005] eKLR.

made some changes to the Act in 2007. But these changes do not address the separation of powers concerns, and do not significantly alter its provisions.

The persistence of Parliament in enacting legislation that violates the separation of powers doctrine and undermines the democratic process is quite worrisome. As we have seen even, where courts of law have pronounced legislation unconstitutional, as in *ex parte Mwau*, Parliament has failed to take any steps to amend such laws. In these circumstances, it should come as no surprise that the public perceive members of parliament as being greedy, selfish and unruly.⁸⁹ Parliament has become a law unto itself and perceives that it is answerable to no one. This situation does not bode well for the rule of law, as it promotes a culture of anarchy. In addition, it leads to the enactment of laws that are not legitimate since they do not have the public's approval.

For its part, the Judiciary, which by the very nature of its business ought to be the foremost custodian of the rule of law, does not always respect the law. The so-called “radical surgery” of the Judiciary that saw the suspension of some twenty judges on allegations of corruption in 2003 provides a good example. In response to allegations of corruption in the Judiciary, in March 2003 the newly-appointed Chief Justice Gicheru constituted an “Integrity and Anti-Corruption Committee” which was to be headed by Justice Aaron Ringera, then judge of the High Court. The Ringera Committee's mandate was to investigate and report on “the magnitude and level of corruption in the judiciary, its nature and forms, causes and impact on the performance of the judiciary” and to identify corrupt members of the judiciary.⁹⁰ The Ringera Committee reported back to the Chief Justice six months later, and caused its list of the judges and magistrates it thought had engaged in corruption to be published in the popular media. The Chief Justice then advised the affected judges and magistrates to resign within two weeks, or be suspended without pay and face tribunals of inquiry.

There are two principal problems with this picture, which only served to undermine the reputation of the Judiciary as the bastion for the rule of law. First, the accused judges and magistrates were publicly labelled as corrupt without being informed of the charges against them.⁹¹ Under the watch of the Chief Justice, the Judiciary thus violated one of the key values of law that it ought to guard jealously, namely respect for the culture of law. Procedural fairness requires that a person

89 Marc Lacey, ‘Kenyan Parliament Unites, for More Money’, New York Times, 22 May 2006.

90 Republic of Kenya, Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya (2003).

91 ICJ, Kenya: Judicial Independence, Corruption and Reform 18 (ICJ, 2005).

accused of an offence should be presumed innocent and given a fair and early opportunity to defend themselves. The Ringera Committee violated these cardinal principles of law. The public naming of the judges and magistrates alleged to be corrupt prejudged the outcome of any subsequent judicial proceedings. As a result, the affected judges and magistrates were condemned well before the commencement of the subsequent tribunals of inquiry.

A second short-coming of the Ringera Committee is that it was composed of sitting judges. In effect, the judges selected by the Chief Justice were now judging their colleagues. Again, this violates rules of procedural fairness, namely that a person cannot be a judge in his or her own cause and that there must be an impartial tribunal if there is to be a fair hearing. Indeed, there were allegations that the members of the Ringera Committee “acted vindictively against their colleagues.”⁹² Further, it is not clear what criteria the Chief Justice used to select the members of the Ringera Committee, so that they could purport to moral authority to sit in judgment over their colleagues. Having been appointed to this committee, they could also not be expected to investigate themselves, raising the question as to who would have investigated them, assuming that there was an objective attempt to investigate corruption in the judiciary as a whole.

B. Commissions of Inquiry, Courts of Law and Grand Corruption

The need for consistent application of the principles and prescriptions of law is particularly necessary if the society is to deal with social ills that hinder its progress, such as corruption. In this regard, courts of law should interpret laws in such a way that assures the citizenry that the law is an important mechanism for society to deal with debilitating ills such as corruption. A question arises as to how Kenyan courts have contributed to the fight against grand corruption. In particular, have the courts interpreted the law in a manner that gives the public confidence in the ability of law to deal comprehensively with grand corruption? In the following paragraphs, I attempt to answer these questions in the context of the interaction between court and commissions of inquiry, which constitute a mechanism for dealing with extra-ordinary circumstances in which the citizenry demand immediate governmental responses to exigencies, such as allegations of grand corruption.

92 Joyce Manyasi, ‘Strengthening Democratic Process in the Kenyan Judiciary: Best Practices, Lessons Learnt and Emerging Lessons’, Judiciary Watch Report – Judicial Reform In Kenya, 25 page 39 (ICJ, 2005).

Although commissions of inquiry are established by law, and invariably use legal processes and procedures to carry out their mandates, for all intents and purposes they are political tools for dealing with volatile political situations. Accordingly, they are a very clear illustration of the instrumental use of law.

In Kenya, the legislative framework for commissions of this nature is found in the Commissions of Inquiry Act.⁹³ This Act empowers the President to appoint “a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.”⁹⁴ Although the commissions typically have some latitude with respect to rules of procedure, they are judicial in nature since they are required to “make a full, faithful and impartial inquiry” into the matter in question and “to report to the President, in writing, the result of the inquiry and the reasons for the conclusions arrived at.”⁹⁵ But the President is under no obligation to make the reports of such commissions public or to implement their findings.

Since Independence, successive presidents have established about twenty-five commissions of inquiry. Invariably, the reports of these commissions are either not made public or are publicized long after the reports were given to the President. This is especially the case with inquiries that, in the opinion of the President and broadly speaking, touch on matters of national security. In many of these cases, the commissions are used by the President as a political tool for containing volatile political situations or individuals. And because the power of the President to appoint commissions of inquiry is not regulated, successive presidents have established such commissions even where the existing legal framework arguably suffices. For example, the Miller Commission of Inquiry was appointed to inquire into the alleged subversive or treasonable conduct of Mr Charles Njonjo, a former Attorney-General and Minister for Justice and Constitutional Affairs. Again, the Akiwumi Commission of 1998 was established to inquire into the participation of civilians and law enforcement officials in the tribal clashes that occurred in 1991. In both cases, the matters in question could have been handled using the existing criminal law.⁹⁶

93 Commissions of Inquiry Act, Chapter 102, Laws of Kenya.

94 Commissions of Inquiry Act, section 3(1).

95 Commissions of Inquiry Act, section 7(1).

96 AfriCOG, *Commissions of Inquiry in Kenya*, page 8.

In addition, commissions of inquiry are established in response to public outcry over certain matters but where there is no political will on the part of the President to implement the recommendations of the commissions. This was the case with the Bosire Commission of Inquiry into the Goldenberg Affair, for example.⁹⁷ An interesting feature of this Commission is that it was established whilst a number of court cases revolving around the Goldenberg Affair were pending.⁹⁸ Indeed, the Bosire Commission served to complicate the resolution of these cases, some of which are yet to be determined.⁹⁹

For the most part, the commission of inquiry is therefore a political instrument at the disposal of the President, even though it is dressed in legal garb. Unfortunately, it has a capacity to undermine the rule of law, since, among other things, successive presidents have tended to appoint sitting judges as heads or members of commissions of inquiry.¹⁰⁰ Not only are such judges drawn into political controversies when they serve on such commissions, but their determinations therein are frequently challenged in courts of law.¹⁰¹ While it is no doubt desirable that the findings of such commissions should be subject to judicial review, appointing sitting judges as commissioners in non-judicial processes may undermine the authority of such judges and the judiciary in general. As the Bosire Commission observed, “judges who serve in politically motivated inquiries run the risk of being dragged into politics and having their reputation for impartiality ruined.”¹⁰²

The case of *Republic v Judicial Commission of Inquiry into the Goldenberg Affair ex parte George Saitoti*¹⁰³ (hereinafter, Saitoti) illustrates why it may not be desirable for sitting judges to serve on commissions of inquiry, and why increasingly these commissions are not suitable forums for the resolution of national exigencies. In

97 AfriCOG, Commissions of Inquiry in Kenya, page 9 (Observing that “Subsequent conduct on the part of the Kibaki Government reveals that opting for the Bosire and Ndung’u commissions of inquiry, instead of direct prosecutions for the suspected corruption under inquiry, was a tactical political exit from a potential fratricidal war with Kenya’s power and property barons implicated in the reports and who were cast on both sides of the political divide.”)

98 Republic of Kenya, Report of the Judicial Commission of Inquiry into the Goldenberg Affair, paragraph 767.

99 Republic of Kenya, Report of the Judicial Commission of Inquiry into the Goldenberg Affair, paragraph 768.

100 AfriCOG, Commissions of Inquiry in Kenya, page 9.

101 AfriCOG, Commissions of Inquiry in Kenya, page 10.

102 Report of the Judicial Commission of Inquiry into the Goldenberg Affair, page 25.

103 *Republic v Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti* [2006] eKLR.

addition, Saitoti illustrates why instrumental interpretation of the principles and prescriptions of law may undermine its authority and legitimacy in the perception of the citizenry.

As we all know, the Goldenberg affair revolved around the activities of a company called Goldenberg International Limited (GIL), which from about 1990 had fraudulently obtained about six billion shillings from the Central Bank of Kenya by taking advantage of loopholes in export compensation laws and regulations by making it appear that it had exported gold, while no gold was exported in fact. Professor George Saitoti was the Minister for Finance when the Government approved GIL's scheme. Once word got out that GIL had swindled the Government, there followed a huge outcry and several initiatives were launched to unravel what quickly became a conundrum. These initiatives included investigations by committees of Parliament, criminal investigations and public and private attempts to prosecute the architects of the fraud. The Bosire Commission was established by President Kibaki in 2003, shortly after the new NARC government assumed office.

Saitoti was unhappy with the Report of the Bosire Commission, as he was adversely mentioned. Among other things, the Bosire Commission reported that Saitoti "knowingly and illegally allowed GIL an enhanced rate of export compensation contrary to the provisions of the Local Manufacturers [Export Compensation) Act. Besides, it was clearly an abuse of his powers as Minister, not to have subjected this application to technical evaluation as he did others."¹⁰⁴ Saitoti quickly moved to court, seeking judicial review orders to quash "the findings, remarks and decisions" of the Bosire Commission and to prohibit the Attorney-General from bringing criminal charges against him. The Court obliged, reasoning that the Bosire Commission erred by purporting to review a decision of Parliament, which had concluded that Saitoti had acted according to the law. The Court also reasoned that Saitoti could not be accorded a fair trial in the circumstances.

This reasoning of the Court merits some interrogation. First, the Court considered that the National Assembly's Public Accounts Committee (PAC) had investigated the Goldenberg affair and concluded in 1995 that "the Government had followed normal procedures of approval in granting the request by Goldenberg International Limited."¹⁰⁵ Further, the Court noted that Parliament had

104 Report of the Judicial Commission of Inquiry into the Goldenberg Affair, paragraph 547, page 219.

105 *Republic v Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti*, page 25.

unanimously adopted this report of the PAC.¹⁰⁶ The Court then made reference to section 12 of the National Assembly (Powers and Privileges) Act, which provides that “No proceedings or decision of the Assembly or the committee of privileges acting in accordance with the Act shall be questioned in any court.” From this analysis, the Court concluded that the Bosire Commission did not have the power to question the decisions of Parliament or committees thereof.¹⁰⁷ In arriving at this conclusion, once Parliament made a policy decision that the approvals given to GIL were procedural, this decision could not thereafter be questioned by a court of law, leave alone an inferior tribunal such as a commission of inquiry.

The Court thus seems to be advocating for a rather rigid notion of the separation of powers that may not lead to fair outcomes. Judicial review must surely be available in such circumstances, and the fact that Parliament made a decision on Goldenberg cannot be a rational bar to judicial review or other public inquiry. As Benjamin O Nwabueze has argued, the checking function of judicial review constitutes a significant means via which individuals can participate in democratic government, especially where they are excluded from decision-making processes because of majority rule.¹⁰⁸

Second, the Court held that should criminal charges be brought against Saitoti, he would not now get a fair trial because “the comments made in Parliament and by other public officers have already prejudiced the principles of a fair trial” and because the errors and breaches of law by the Bosire Commission “have been widely and serially published nationally as truth and law in the past three years.”¹⁰⁹ The Court also reasoned that since many years had passed without any criminal charges being brought against Saitoti, his constitutional right to a fair trial within a reasonable time would now be violated.¹¹⁰ It is worth quoting the reasoning of the Court on this particular issue:

The Applicant is a Member of Parliament who in making his contribution in Parliament defended himself on the floor of the August House. Historically Parliaments were in certain jurisdictions called the High Court of Parliament in that as regards matters within

106 *Republic v Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti*, page 25.

107 *Republic v Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti*, page 27.

108 Benjamin O Nwabueze, *Judicialism In Commonwealth Africa: The Role of the Courts in Government*, pages 229-231 (Hurst, 1977).

109 *Republic v Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti*, page 36.

110 *Republic v Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti*, page 36.

their jurisdiction they were regarded as final and could not be reopened elsewhere. There is a semblance of double jeopardy.¹¹¹

Accordingly, the Court is reasoning that since Saitoti was already tried in Parliament, it would amount to double jeopardy if he were now to be tried in a court of law. Quite apart from the fact that the Court is here stretching the notion of double jeopardy beyond rational limits, the idea that a parliamentary inquiry should act as a bar against judicial inquiry is absurd. In any case, the absence of speedy investigations and prosecutions in the Goldenberg affair is arguably attributable to deliberate inaction by the Government.¹¹² The idea of a fair trial within a reasonable time should therefore be examined in context, and a court seized of the matter must necessarily inquire into the circumstances that may have contributed to the failure to institute criminal charges in a timely manner.

In this respect, the Court likened *Saitoti's* case to that of *Stanley Munga Githunguri v Republic*,¹¹³ where the court held that it is an abuse of court process to charge a person after a decision had been made not to prosecute him, and this decision communicated to him and assurances given that he would not be prosecuted again. In likening Saitoti's circumstances to that of Mr Githunguri, the court argues that the Attorney-General's contribution in Parliament – to the effect that the Government's decision to grant export compensation to Goldenberg International was procedural – created an "implied representation" that criminal proceedings would not subsequently be brought against Saitoti.¹¹⁴ Even if one were to say that the Court ultimately made the right decision, this kind of reasoning stretches legal interpretation beyond reasonable bounds. Quite simply, the circumstances of Mr Githunguri and Mr Saitoti are as similar as day and night.

In addition, this decision sets a bad precedent since it renders the Report of the Bosire Commission worthless. In all likelihood, any person now adversely mentioned in the report of a commission of inquiry will rush to court,¹¹⁵ and where such a person obtains favourable orders, it means that no courts of law can try them

111 *Republic v Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti*, page 36.

112 Republic of Kenya, Commission of Inquiry into the Goldenberg Affair, paragraphs 757-784.

113 *Githunguri v Republic* [1986] KLR 1.

114 *Republic v Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti*, page 36.

115 *Wilfred Karuga Koinange v Commission of Inquiry into Goldenberg*, Nairobi High Court, Miscellaneous Application number 372 of 2006 (UR). It should be noted that in this case the court declined to issue the orders of certiorari and prohibition, and reasoned (at page 14) that the public interest demanded that the issues raised by the applicant "should be determined in a proper trial, and should not be stayed by the court merely because they relate to issues raised 4, 8, 12 or more years ago").

for any offence they may have committed.¹¹⁶ That only leaves the political option of implementation of the report by the President, which may not happen where there is no political will to act. In all likelihood, the social ill that the commission of inquiry was in the first place established to deal with will therefore not be addressed. As far as the war against grand corruption is concerned, the decision in Saitoti will make it much harder for the country to deal with this debilitating ill.¹¹⁷

To make matters worse, Commissions of Inquiry have an inherent weakness in that they are *ad hoc* and become *functus officio* once they have delivered their report to the President. They do not therefore have an opportunity to correct their mistakes should a court of law subsequently determine that their decisions, or the manner in which they were arrived at, were wrong or unreasonable. In many ways, commissions of inquiry are therefore a waste of time, effort and money. A further limitation of commissions of inquiry is that their recommendations are hardly ever implemented. In these circumstances, the fatigue among the citizenry and loss of belief in the usefulness of commissions of inquiry is understandable.

C. Public Perceptions of Law

Taken together, the foregoing illustrations of governmental disregard or disrespect for the principles and prescriptions of the rule of law have the potential to make the citizenry lose faith in the law's authority and legitimacy. Whenever the citizenry see governmental entities and officials treat the law instrumentally and with only parochial goals in mind, there is a likelihood that they will themselves begin to treat the law with contempt. The emerging culture of impunity is arguably a by-product of such resulting public perceptions that law does not matter.

There are also indications that the citizenry may be losing faith in the authority of law. For example, the prevalence of "mob justice," which involves the lynching of criminals by the public, can be explained as a reaction of the citizenry to the inability of the police and the courts to guarantee them justice.¹¹⁸ That is, it is a reaction to the fact that in numerous cases, criminals who have been apprehended and handed over to the police for prosecution are released for lack of evidence, or

116 See, e.g., Jillo Kadida, 'Is this the End of the Goldenberg Cases?' Daily Nation, 21 November 2008; Judy Ogutu, 'Court Also Frees Kotut,' East African Standard, 21 November 2008.

117 See Paul Mwangi, 'Why Saitoti Ruling is Dangerous for Future of Justice in Kenya', Daily Nation, 2 April 2007.

118 Edwin A Gimode, 'Anatomy of Violent Crime and Insecurity in Kenya: The Case of Nairobi, 1985-1999', Africa Development, 26, 295, page 313 (2001).

because the police interfered with the evidence so that it cannot be used in court, or because powerful criminals bribed judicial and police officers.¹¹⁹ As Ewa Wojkowska has observed, “If there are no viable means of resolving societal disputes, the alternatives are either violence or conflict avoidance – which in itself is likely to lead to violence later.”¹²⁰ In the recent past, the courts have also unconditionally released many accused persons who have been detained by the police for periods longer than the constitution permits.¹²¹ In doing so, the courts have reasoned that any “unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.”¹²² Even though the courts may be technically correct in making such decisions, this approach may have a deleterious effect on public respect for the authority of law.

It is perhaps out of a concern that this technical approach may be subverting the course of justice that the Court of Appeal sought to clarify the law in *Dominic Mutie Mwalimu v Republic*.¹²³ Here, the appellant contended that he should be released since he had been taken to court seventeen days from the date of arrest, thereby breaching his constitutional right. The Court of Appeal declined to do so, reasoning that “the mere fact that an accused person is brought before court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not *ipso facto* prove a breach of the Constitution.”¹²⁴ In the court’s view, “each case has to be considered on the basis of its peculiar facts and circumstances.”¹²⁵ This case is thus a clear example of how courts can interpret the law so as to salvage the criminal justice system from a reputation that it produces absurd results even in clear cases. By adopting such a sensible approach, the courts are able to balance the constitutional rights of accused persons with the practical resources and bureaucratic constraints that the police and prosecutorial services may face in their efforts to enforce the criminal law. Indeed, the police argue that the

119 Gimode, page 313.

120 Ewa Wojkowska, ‘Doing Justice: How Informal Justice Systems can Contribute’, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, (UNDP, 2006) page 6.

121 *Albanus Mwasia Mutua v Republic* [2006] eKLR; *Gerald Macharia Githuku v Republic* [2007] eKLR; available at <www.kenyalaw.org>, *Paul Mwangi Murungu v Republic*, Criminal Appeal number 35 of 2006 (UR).

122 *Albanus Mwasia Mutua v Republic* [2006] eKLR, available at <www.kenyalaw.org>.

123 *Dominic Mutie Mwalimu v Republic* [2008] eKLR, available at <www.kenyalaw.org>

124 *Dominic Mutie Mwalimu v Republic* [2008] eKLR, pages 5–6.

125 *Dominic Mutie Mwalimu v Republic* [2008] eKLR, page 6.

constitution's twenty-four hour and fourteen-day deadlines are impractical and may hinder the attainment of justice.¹²⁶

A further indication that the citizenry are losing faith in the law is to be found in the increasingly common practice of deploying clientelism that is based on personal relationships with judicial officers to access the courts, instead of trusting in the capacity of the judiciary to give blind justice. Because the citizenry do not have faith in judicial procedures and processes to produce just outcomes, they are inclined to "work the system" by seeking the intervention of judicial officers so that they are given favourable treatment. That is, the citizenry begin to prefer "non-legal means" to get "justice" in the courts.¹²⁷ This tendency is not unique to Kenya. As Marina Kurkchian has observed in respect of countries such as Ukraine and Russia, "Once people become convinced that the law will not bring about a just outcome if left to itself, the effect is that everyone involved feels compelled to make an effort to exert influence by whatever means available."¹²⁸

IV. MAKING LAW PROMISE JUSTICE

If law is to reassert its authority in Kenya and regain its significance as a guide for social conduct in Kenya, it must promise justice. But how can we ensure that law promises justice? In my view, we can make law promise justice in the following ways.

First, we need to reconceptualize the nature of our law. For the majority of our citizens, the law and its ritualistic processes are viewed as alien since they are expressed and transacted in a foreign language. This makes it difficult for the citizenry to identify with the law, and embrace it as a guide for their conduct. This is especially true of the criminal law, which is entirely based on English law. In particular, our criminal law ignores local and customary practices of dealing with members of society who have committed criminal offences.¹²⁹ For example, the fact that a person accused of rape or murder is released by a court of law because he or she was detained longer than the constitution permits does not resolve the social problem from the perspective of the victims of the crime. For the victims, such a

126 Kenya Police Force, Report of the Stakeholders Forum for the Development of a National Crime Prevention Strategy and Action Plan, Silver Springs Hotel, Nairobi, 29-31 August (2007) page 17.

127 Marina Kurchian, 'Judicial Corruption in the Context of Legal Culture' in Corruption and Judicial Systems, 99, page 104 (Cambridge: Transparency International, 2007).

128 Marina Kurchian, page 104.

129 See, e.g., Katherine Luongo, 'Conflicting Codes and Contested Justice: Witchcraft and the State in Kenya,' *Les Cahiers de L'IFRA*, 27, 3 (2005).

decision by the court does not provide justice. In any case, there is still a need to reintegrate the accused into the community if societal harmony is to be restored.

One key way in which we can reconceptualize our law is by recognizing and giving effect to informal systems of justice, which refer to “dispute resolution mechanisms falling outside the formal justice system.”¹³⁰ In particular, we need to incorporate customary notions of criminal justice, which have totally been ignored by our formal system of justice, thanks to colonial racial biases against African customary criminal law. To the extent that informal systems of justice can be participatory, accountable, non-discriminatory and adhere to international human rights norms, they can go a long way towards legitimizing law in the perception of the citizenry.¹³¹ And by giving informal justice systems legal recognition, we would be appreciating the fact that whatever law is, it definitely must include a society’s concrete usages or social and ethical practices. Indeed, it has been observed that “Informal justice systems are the cornerstone of accessing justice for the majority of the population in many countries.”¹³² Kenya should not be different. The idea, therefore, is that although institutionalized norm enforcement, which the formal justice system embodies, is a predicate of the institution of law, its legitimacy largely depends on whether or not its properties are embraced by the citizenry as a guide for their conduct. Integrating informal justice systems with a formal justice system thus provides a mechanism for legitimating law. And where law is accepted as a guide for human conduct, its authority will also be guaranteed.

Second, we need to transform how we teach and practice law by making ethics a core component of the training of lawyers, judicial officers and other actors in the market of law. At present, students of law are only taught professional ethics in their fourth year of study, by which time they have already perfected the art of using law instrumentally. But we, as teachers of law, do not do a good job of making them appreciate that the instrumental application of law may undermine law’s claim to legitimacy and authority if it is perceived by key segments of society as only protecting the interests of a minority. The instrumental use of law must always be balanced with the need to do justice, otherwise law will begin to lose its power. This explains why, in many societies, the poor “see law as a tool which the wealthy and well-connected can use against them.”¹³³ In Kenya for instance, it is

130 Ewa Wojkowska, page 5.

131 Ewa Wojkowska, page 10.

132 Ewa Wojkowska, page 12.

133 Jorge E Hardoy and David Satterwaite, *Squatter Citizen: Life In The Urban Third World* 16 (London: Earthscan, 1989).

difficult for the citizenry to understand why petty offenders are given long and severe jail terms, while suspected perpetrators of grand corruption schemes invariably go scot-free. In this regard, it is worth noting that it is usually the poor who are on the receiving end of vaguely defined criminal offences. Offences such as “public nuisance” or “breach of the peace” often “result in conviction on the basis of little evidence, and [give] the police wide latitude to use their discretion in arresting or harassing the poor.”¹³⁴ And poor folks trying to eke out a living in the informal sector of our economy are invariably in running battles with the legal authorities. Thus the poor are always deemed to be in breach of one law or another, leading them to observe, quite legitimately, that “there must be something wrong with a law or code if it is broken daily by so many people as they go about their daily lives.”¹³⁵ As a result, the poor invariably mistrust the law. Even worse, they begin to lose respect for the law.

The dilemma for lawyers is that professional ethics demands that they should not deny any person their expertise. That is, a lawyer is not supposed to choose his or her clients. When a client comes to you, your professional duty is to provide them with the best legal services you can muster. To put it differently, a lawyer’s primary obligation is to provide the client with access to the law.¹³⁶ And in the context of the judicial process, your duty is to present your client’s case as well as you can, and leave it to the court to determine the outcome. At the same time, however, a lawyer is an “officer of the court,” which means, among other things, that a lawyer has a duty to assist the court in coming up with just outcomes. How can we reconcile these almost diametrically opposed obligations? Can a good lawyer also be a good person, in the sense that he or she is also committed to doing good to society? To ask a question that is more relevant to our circumstances, should a lawyer whose client is accused of grand corruption, and who has admitted to the lawyer that she actually committed the crime, use the law’s technical procedures to perpetually delay and frustrate the criminal justice process? What obligation does such a lawyer have to society, especially where grand corruption is a great impediment to efforts to ameliorate widespread poverty?

Admittedly, these are difficult questions. But we must, in teaching professional ethics, endeavour to give students the knowledge that will enable them to strike a

134 Michael R. Anderson, ‘Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs’, (Paper for Discussion at WDR Meeting, 16–17 August, 1999) (unpublished) page 21.

135 Hardoy and Satterwaite, page 31.

136 Stephen L Pepper, ‘*Lawyers’ Ethics in the Gap Between Law and Justice*,’ South Texas Law Review, 40, 181, page 189 (1999).

good balance between their duty to their clients and their duty to society and to justice. Whereas the idea of engaging clients in moral conversations is a minefield fraught with many dangers, it should “be part of the lawyer’s ethical responsibility to clarify to the client that he or she has a moral choice in the matter.”¹³⁷ Especially “where the gap between law and justice is significant,” it “ought to be part of the lawyer’s ethical obligation to clarify that merely because one has a legal right to do x, doing x is not necessarily the right thing to do.”¹³⁸ As we have noted, the danger is that where law trumps justice in such cases, the law will begin to lose respect and its authority to guide societal conduct. This is why it is important for lawyers, judges and administrators who have the duty of interpreting law to adopt a culture of fidelity to law so that they appreciate that the instrumental application of law may be detrimental to the law’s claim to legitimacy and authority.

But in saddling lawyers with such ethical obligations, we need to appreciate that engaging clients in ethical discourse about the gaps between law and justice can only work where the society of which the lawyer and the client are a part has “a common tradition, in common assumptions and ethical perceptions.”¹³⁹ Can we really say that we, as Kenyans, have this common ethical culture? Or are we a society that glorifies the ends of formal legal processes, irrespective of whether or not they produce just outcomes? These are questions that we can only answer through social inquiry. But should such inquiry reveal, as I suspect, that we do not share a common ethical culture, and then it will be important for us to begin inculcating such a culture in our children.

Third, we need to establish mechanisms that will facilitate better accountability of the instrumental use of law by the courts. This is because judicial officers are the primary guardians of probity and fairness in the formal justice system; their interpretation of law therefore impacts a great deal on public perceptions of justice. Where our courts do not, as in the case of the radical surgery we have discussed in Part III above, adhere to their own principles and processes, people begin to see the law as being expedient, and as an instrument that is at the disposal of the rich and powerful to achieve their parochial goals. Such perceptions deny law its claim to respect, legitimacy and authority.

137 Stephen L Pepper, pages 190, 193 (Observing that such conversations “might well intimidate, manipulate, embarrass or even humiliate the client” thereby creating a “significant barrier to the client’s obtaining access to the law”).

138 Pepper, page 190.

139 Pepper, page 197.

While we must acknowledge on-going efforts by the Judiciary to restore its legitimacy in the perception of the citizenry, much more needs to be done if the courts are to be a legitimate forum for the attainment of justice. For example, since we can expect that allegations of corruption will always be made against judicial officers, we must establish a fair, rule-based and independent committee to deal with complaints about the conduct of judges.¹⁴⁰ More importantly, perhaps, we need to deal comprehensively with the troubling and increasingly ubiquitous problem of the “judicialization of politics”. The Judiciary has also allowed itself to be politicized to an extent that undermines its claims to be the provider of justice. Increasingly, the courts are deployed to resolve disputes that arguably ought to be resolved in the political arena. It is this phenomenon that has been termed the “judicialization of politics,” and can be observed in a number of cases dealing with aspects of the constitutional review process, where the courts have been asked to resolve matters on which protagonist political parties and civil society actors have failed to agree.¹⁴¹ It can also be observed in the *Saitoti case* discussed above, where the Court took away the decision as to whether or not to institute criminal charges from the Executive branch of government.

The danger of judicializing politics is that the judiciary may exceed the boundaries of its powers within the scheme of the separation of powers doctrine. Should courts exceed the bounds of the judicial power, two dangers arise. First, the courts may lose their claim to impartiality as they are likely to be perceived to be taking sides in political contexts. If they are not careful, courts that are embroiled in politics could therefore lose public legitimacy altogether. Second, judicializing politics could lead to judicial tyranny if it leads to outcomes that “are at odds with the general public good” since there would be no one to appeal to.¹⁴²

In order to avert these dangers, courts elsewhere have developed two doctrines to enable them keep within the bounds of the judicial power. These are the overlapping doctrines of “justiciability” and “the political question.”¹⁴³ The doctrine of justiciability holds that judicial power is to be exerted only in respect of “justiciable matters.” A matter is justiciable only if the following elements are met:

140 See Report of the Advisory Panel of Eminent Commonwealth Judicial Experts (2002).

141 *Njoya and others v Attorney-General; Patrick Ouma Onyango and others v Attorney General and others* [2005] eKLR, available at <www.kenyalaw.org>

142 Joel M Ngugi, ‘Stalling Juristocracy While Deepening Judicial Independence in Kenya: Towards a Political Question Doctrine’ (ICJ Kenya, 2007) page 12.

143 See, e.g., JM Migai Akech, ‘Judicial Review of Spending Powers: Should Kenyan Courts Entertain Taxpayers’ Actions?’ *Journal of African Law*, 44, 195 (2000).

(i) the matter is of a legal nature, in the sense that it affects a person's recognized legal rights or relations; (ii) the violation alleged by the person making it has injuriously affected that person's legal rights or relations by inflicting, or threatening, actual harm; and (iii) a judicial remedy is available to redress the violation complained of.

The doctrine of standing is concerned with the second element of justiciability, namely, whether the plaintiff is a proper party to request an adjudication of the legal issues presented before the court. The question is, does the plaintiff have a "personal stake" or "sufficient interest" in the matter before the court to merit the court's attention? The plaintiff has such a stake if he or she has suffered a concrete injury, the injury has been caused by the defendant's conduct and the injury is redressable. The application of this doctrine therefore means that the circumstances in which courts will entertain actions by litigants is circumscribed.

The political question doctrine, on the other hand, deals with the other two elements of justiciability. It recognizes that certain constitutional commands are not enforceable by the courts because they "clearly fall outside the conditions and purposes that circumscribe judicial action." They are called political questions because they impose political, rather than legal, duties. Their violations are thus to be resolved, not by judicial remedies, but by the political process. In interpreting constitutions therefore, the courts are wont to sift the justiciable matters from the non-justiciable, and to refer political questions to the political departments for resolution. Thus a matter is non-justiciable if it cannot be resolved by "judicially manageable standards".

Unfortunately, the Kenyan courts have invaded the political arena without developing any standards that would help keep them within the bounds of the judicial power.¹⁴⁴ The resulting danger is that where the courts have entered the political arena, they may be perceived to be making subjective decisions that do not serve the wider public interest. Our courts therefore need to appreciate that they exercise a delicate power, and that they will only be accepted by the citizenry if their exercise of the judicial power is restrained and reaches decisions that command societal respect since they are seen to be serving the public good. This is why our courts must now develop a political question doctrine to enable them stay out of political contests.

It should also be appreciated that Kenyans increasingly resort to the courts to resolve political questions because of the rot in our politics. But in saddling the

144 Ngugi, pages 12, 15.

Judiciary with political problems, we are undermining its authority to regulate our conduct to our detriment. It is for this reason that we must differentiate legal problems from political problems. Accordingly, making law promise justice entails resolving political problems in the political arena so that courts are perceived to be dealing with matters that they can, and are designed to, handle. We must therefore appreciate the fact that law is a limited tool, and will only be a useful guidance for social conduct if other processes in society, for example, politics, are workable.

Fourth, and above all, we need to establish administrative law mechanisms that will enable the citizenry to interrogate legal processes. In this regard, administrative law should be seen as an instrument for democratizing the law and its procedures and processes. Because law is often vague and its application depends on how it is interpreted, we need processes that will enable all members of society to participate in this game of interpretation.

Administrative law has traditionally sought to regulate the legal powers that are granted to public agencies to enable the executive branch of government perform its role in governance. Essentially, administrative law has performed two roles.¹⁴⁵ First, it performs a constitutive role of creating public agencies, granting them powers and imposing duties on them. Second, it serves a regulatory role of controlling the actions of these agencies. In doing so, administrative law recognizes a need for public power and its efficient exercise, and even more significantly perhaps appreciates a need for protection against the abuse of power.¹⁴⁶ Administrative law therefore seeks to regulate public power. In this regard, it supplements constitutional law and is an effective mechanism for the realization of constitutionalism. While constitutional law sets out broadly the powers of the Executive and other branches of government, administrative law serves the important role of ensuring that public agencies do not abuse the powers that are granted to them in acts of Parliament. It is therefore a critical instrument in the realization of limited and democratic governance.

For the most part, administrative law performs its role by establishing procedures that regulate the exercise of power by public agencies. Procedures constitute a means for reaching decisions or other results, and facilitate the proper application of law, so that the objects of the enabling legislation can be achieved.¹⁴⁷ In addition, the objects of legislation are influenced by transcendental values such as

145 David Foulkes, *Administrative Law 2* (London: Butterworths, 8 ed 1995).

146 David Foulkes, page 2.

147 Galligan, page xviii, 5.

fairness, democracy and citizenship. Procedures therefore perform a second function of ensuring that such values are respected in governmental decision-making.¹⁴⁸ For example, procedures facilitate the fair treatment of the persons whose lives are affected by the actions of public agencies.¹⁴⁹

Law creates power; those who can interpret it to serve their goals and needs have power. Accordingly, by creating opportunities for the citizenry to participate in the game of interpreting law and its processes, we make the instrumental use of law accessible to everyone. We can do so by creative use of the instruments of administrative law, thereby making it possible for the citizenry to believe that by participating in legal processes, they will influence outcomes. If this happens, law will surely promise justice. For example, we can create mechanisms that will allow the citizenry to question why the Kenya Anti-Corruption Commission and the Attorney-General have not seen fit to prosecute any of the perpetrators of the Anglo-Leasing scam. At the moment, whether we like it or not, we have to accept the inaction of these authorities. The power games evident in the exercise of the prosecutorial power are detrimental to the public interest and undermine the legitimacy of law. They can be reduced significantly by creating administrative law mechanisms to enable citizens to question the wisdom, rationality or fairness of the actions, omissions and decisions of agencies such as the KACC and the Attorney-General.¹⁵⁰

As we reform law so that it can promise justice, we must also appreciate the limitations of law. If the rule of law ideal is to facilitate good and ethical governance in Kenya, we need to find out, through social, psychological and anthropological studies, whether and why there has been an erosion of good cultural and other ethical practices that may be contributing to the entrenchment of the culture of impunity. In this regard, we should be concerned that institutions behaviour, such as church demoninations or main stream religions, may be losing the ability to guide the social conduct of their members. In particular, some so-called church leaders have often taken sides in political contests, and have lost their moral authority to tell their members that particular modes of conduct are good or bad.

148 Galligan, pages 7-8.

149 DJ Galligan, page xviii.

150 See, e.g., Rachel Barkow, 'Separation of Powers and the Criminal Law,' *Stanford Law Review*, 58, 989 (2006).

V. CONCLUSION

For the rule of law to form a useful basis for governance in Kenya, we need to appreciate the nature and limitations of the discipline of law. Law is a powerful yet delicate instrument that can easily be disempowered. Law can only be powerful where it is used in a way that commands the respect of the public. If the public perceive law to be alien, oppressive, selective, or biased, they will begin to mistrust law. People who mistrust the law are likely to resolve their grievances and other issues using non-legal means. And where there is no respect for law, the law of the jungle takes over. The emerging culture of impunity that is fast taking root in Kenya is a direct consequence of such disrespect for law.

If we are to deal with this culture of impunity, we need to restore public faith in law and legal procedures and processes. This paper has argued that we can restore the authority of law by embracing the ethics of the rule of law. The paper sees the rule of law as an empty vessel that must be filled by ethical and cultural norms that ensure that law, at the very least, promises justice. The paper has made a number of proposals in this quest of making law promise justice:

- (i) we must interrogate the nature of our law. If our people find the law alien, we must incorporate their conceptions of law within the legal system, so that law can become something they can identify with and respect.
- (ii) we need to transform the way we teach and train law actors by making ethics a core component of legal training. And while doing so, we must interrogate whether as a country, we have a common ethical culture.
- (iii) the judiciary, which is seen as the bastion of justice, should develop mechanisms that will enable it to exercise the judicial power with restraint and to stay out of matters that should really be resolved by other societal processes. Such mechanisms will be particularly essential if the judiciary is to be seen as a fair arbiter whose integrity the public can believe in.

Above all, we need to establish creative mechanisms that will enable as many citizens as possible to participate in the game of using and interpreting law. Administrative law constitutes the conceptual basis of such mechanisms. But as we endeavour to institute these reforms, we need to appreciate the limits of law and interrogate the moral fabric of our society. It may turn out that it is not just our law that needs fixing; the ethical foundations of our society may also merit close scrutiny.

THE USE OF TRADITIONAL CONFLICT MANAGEMENT METHODS IN THE NATION-STATE CONFLICT IN AFRICA

Emma Oketch

I. INTRODUCTION

The roots of the modern state system can be found in antiquity in the Greek city states of 800-168 BC. The modern state is a European construct that emerged in the 15th and 16th centuries and matured in the 17th century. It came into being in 1648 after the Treaty of Westphalia. The treaty ended the 30 years' religious wars of 1618-1648 and led to the notions of sovereignty (independence) over the geographically delineated territory, political integration and economic expansion, the emergence of a new authority and the birth of capitalism, science and technology. The emergence of the modern state system coincided with the following important developments: the secularization of politics, the Industrial Revolution and development of capitalism, the unifying of cultures around a dominant language and transfer of loyalty from the nation to the state. This ensured the growth of the nation state.³⁴⁶

With the end of the colonial order in Africa the challenge has been to replace the colonial order with viable nation states. For many African nations, independence provided the opportunity for reclaiming political, economic and cultural stakes within the new states; however, these claims could not be tolerated within the state-centric Westphalian framework where the higher aspirations of African ethnic groups had to be surrendered to modern state-building projects.³⁴⁷ The struggle for nationhood and nation-building has lost ground to ethnic and sectional interests. The capacity of the new states at independence was eroded by ethnic-based political parties, patron clientelism, and ethnic-elite politics, the erosion of multipartism, personal rule and corruption. The pluralistic ethnic nations found in the African state made it difficult for the creation of the nation state.³⁴⁸ By embracing the Westphalian model it was assumed that the creation of the state would lead to the building of a nation and yet Africa is characterized by cultural and political units existing in a multiplicity of forms and combinations (the new medievalism).³⁴⁹

346 Anthony Smith, 'State Making and Nation building', in John A Hall(ed) *States in History*, (Oxford: Basil Blackwell, 1986) page 230.

347 See Malaquias Assis, 'Peace operations in Africa: Preserving the Brittle State?', *Journal of International Affairs*, Volume 55 number 2 Spring (2002) pages 415 – 440.

348 See Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control*, (Princeton: Princeton University Press, 2000).

349 See Alfred Cobban, *The Nation State and National Self Determination*, (New York: Thomas Y Crowell Family, 1969).

African states modelled on the Westphalian system implied that common sovereignty would provide common institutions and a common political tradition from which emerged a sense of nationhood that transcended cultural differences.³⁵⁰ The Westphalian model seems irrelevant because there is a conflict between the state and the nation which has not been resolved (ethno nationalism). African states are artificial and fragile as they are not the result of a period of social, political, scientific and religious development determined by Africans. The imposition of the Westphalian model transformed and complicated Africa's development of its own models.³⁵¹ Africans in the pre-colonial system were pluralistic nations (cultural and linguistic) and African resistance showed unwillingness to embrace the Westphalian model. Nationalism and ethnicity are central to Africa's internal struggles and it has been argued that ethno-nationalism is a reaction to the excesses of centralizing states.³⁵²

The nation state seems to have a bleak future in Africa but, oddly, there seems to be a strong attachment and commitment to the nation state in Africa. Indeed the more the state disintegrates the more the need to re-establish it, and the more illusory the idea of the nation the more it is proclaimed.³⁵³ Indeed, there are few rebellious or secessionist movements in Africa.

To ensure a viable nation state it is important to manage the conflict between the nation and the state and between ethnic nation states. The successes or failures of building a nation state depend on the political articulation of ethnicity, the nature of governance and the representativeness of institutions.³⁵⁴ It is therefore important to look at the mechanisms, processes and institutions for managing ethnic conflict. The representativeness of both traditional and modern methods of conflict management may go a long way in ensuring the management of ethnic conflict. This would help transcend cultural differences and ensure the viability of the nation state project in Africa.

350 Otto Pflanze, 'Nationalism in Europe, 1848-1871', *The Review of Politics*, 28, number 2, (1966) , pages 129-143:139.

351 See Christian Potholm, *Four African Political Systems*, (Englewood Cliffs: Prentice Hall, 1970).

352 Stanley Tambiah, 'The Nation-State in Crisis and the Rise of Ethno nationalism', in *The Politics of Difference: Ethnic Premises in a World of Power*, ed. by Edwin N Wilmsen and Patrick McAllister (Chicago: University of Chicago Press, 1996).

353 Sam Clement Nolutshungu, *Limits to Anarchy: Intervention and State Formation in Chad* (Charlottesville: University Press of Virginia, 1996) page 280.

354 Richard Joseph, 'Nation State Trajectories in Africa', *Georgetown Journal of International Affairs*, Winter/Spring 2003, 13-20: page 16.

II. ETHNIC CONFLICT

According to Anthony Smith³⁵⁵ an “ethnic community” is a (named) human population with a myth of common ancestry, shared memories, and cultural elements; a link with a historic territory or homeland; and a measure of solidarity. The six criteria must be met before a group can be called an ethnic community. First, the group must have a name for itself. The lack of a name indicates the lack of a sufficiently collective identity. Second, the people in the group must believe in a common ancestry. Third, the members of the group must believe that they have shared historical experiences. Fourth, the group must have a shared culture, which is generally based on a combination of language, religion, laws, customs, institutions, dress, music, crafts, architecture, and even food. Language and religion are especially powerful ethnic markers. Fifth, the group must feel attachment to a specific piece of territory which it may or may not actually inhabit. Sixth, the people in a group have to think of themselves as a group in order to constitute an ethnic community. They must have a sense of their common ethnicity; in other words they must be self-aware.

Ethnic conflict arises on the basis of political, economic, social, cultural, or territorial issues between two or more ethnic communities or an ethnic community and the state and this compromises state and nation building.

Scholars disagree about the origins and dynamics of ethnic identities. The debate is a difference of opinion about whether or not ethnic identities have deep historical roots and if these ethnic identities change significantly over time. Primordialists, scholars like Stack,³⁵⁶ contend that ethnic identities have deep historical roots and change little over time. For primordialists a sense of peoplehood forms the essence of ethnic identity. Stack argues that ethnicity becomes an expression of basic group identity; basic national fundamental group attributes are passed down from one generation to the next. Instrumentalists like Samarasinghe³⁵⁷ maintain that ethnic identities are often recent constructs and that they change dramatically with the passage of time. Instrumentalists maintain that political elites play decisive roles in constructing and shaping ethnic identities and that their

355 See Anthony D Smith, *The Ethnic Origins of Nations* (Oxford: Basil Blackwell, 1986), and see also Anthony Smith, *National Identity* (London: Penguin, 1991).

356 See John Stack, ‘Ethnic Mobilization in World Politics: The Primordial Perspective’, in *The Primordial Challenge: Ethnicity in the Contemporary World*, ed by John Stack (New York: Greenwood Press, 1986) pages 1–11.

357 See Stanley Wilkin Rabindranath de Alwis Samarasinghe, and Reed Coughlan (eds), *Economic Dimensions of Ethnic Conflict*, (London: Pinter Publishers, 1991).

actions are driven largely by political and economic self-interest. Deng³⁵⁸ argues that the state is central in fostering harmony or discord among the region's diverse religious and cultural groups. He argues that the problem is not the differential perceptions or identities of groups in a country that foment trouble but the fractured elites who accentuate differences among groups to gerrymander public resources and power. Markakis³⁵⁹ maintain that ethnicity and identity do not induce conflict, but it is disputes over power and resources that induce conflict. Leadership then becomes a key factor that can transform human differences into sources of conflict.³⁶⁰ Political leaders can cause divisive politics in societies that lack strong civic organizations. If the leadership fails to imagine a positive sum game with followers and other groups in society it can lead to disagreement within communities.

Collective identities are thought to be conflict-prone because they derive from fundamental, incontrovertible and non-negotiable values such as language, territory, history and religion.³⁶¹ Ethnic appeals to mobilize and rebel derive from a blend of structural factors (relative size and location of ethnic groups), instrumental factors (role of elites who have vested interests in advancing particularistic agendas) and normative determinants (an appreciation of institutionalized forms of conflict resolution as opposed to coercive measures).

III. UNDERLYING CAUSES OF ETHNIC CONFLICT

Brown³⁶² has identified the underlying causes of ethnic conflict as structural, political, economic and cultural factors.

Three structural factors have been identified as important precursors of ethnic and internal conflict: weak states, intrastate security and ethnic geography. Weakness of states arise from artificial constructs which lack political legitimacy, politically sensible borders and political institutions capable of exercising meaningful control over territories placed under their supervision. When states are

358 See Francis Deng, *War of Visions: Conflict of Identities in the Sudan*, (Washington DC: The Brookings Institution, 1995).

359 See John Markakis 'Ethnic Conflict and the State in the Horn of Africa' in *Ethnicity and Conflict in the Horn of Africa*, ed by Katsuyoshi Fukui and John Markakis (Athens: Ohio University Press, 1994).

360 See Abdi Ismail Samatar, 'Leadership and Ethnicity in the Making of African State Models: Botswana and Somali,' *Third World Quarterly*, Volume 18, number 4, September 1997, (pages 687-707).

361 See Roy Licklider, 'The Consequences of Negotiated Settlements 1945-1993', *American Political Science Review*, 89, number 3, September 1995 pages 681-690.

362 Michael Brown, (ed) *Ethnic Conflict and International Security*, (Princeton NJ: Princeton University Press, 1993).

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weak, individual groups within these states develop security concerns. Groups worry that other groups may pose security threats and feel compelled to provide for their own defence and hence threaten the security of others. The third structural factor is ethnic geography. States with ethnic minorities are more prone to conflict than others, and certain kinds of ethnic demography are more troublesome than others. Countries with highly intermingled populations are less likely to face secessionist demands. Countries with groups distributed along regional lines are more likely to face secessionist demands.

Political factors include the type and fairness of a country's political institutions. Closed authoritarian systems are likely to generate considerable resentment over time especially if the interests of some ethnic groups are served. The dynamics of inter-group politics is important. The prospects for violence are great if groups, whether they are based on political, ideological, religious or ethnic affinities, have ambitious objectives, strong senses of identity and confrontational strategies. Elite politics and specifically the tactics employed by desperate and opportunistic politicians in times of political and economic turmoil can cause ethnic conflict. Ethnic scapegoating may be employed in this context and the mass media may be employed in partisan and propagandist ways that further aggravate interethnic tensions.

Economic problems like unemployment, inflation and resource competition may contribute to societal frustrations and tensions. Discriminatory economic systems, whether they discriminate on a class basis or an ethnic basis, can generate feelings of resentment and frustration resulting in the generation of violence. Indicators may include unequal economic opportunities, unequal access to resources such as land and capital and vast differences in standards of living.

Cultural discrimination against minorities like inequitable educational opportunities, legal and political constraints on the use and teaching of minority languages and constraints on religious freedom are underlying causes of ethnic conflict. Group histories and group perceptions of themselves and others are important. When two groups in proximity have mutually exclusive negative perceptions of each other, the slightest provocation of either side confirms deeply held beliefs and provides justification for a retaliatory response.

IV. ETHNIC CONFLICT REGULATION

Ethnic conflict regulation³⁶³ means the termination and elimination of ethnic conflict. Ethnic conflict regulation is problematic because conflict is ever present in society and it cannot be eliminated, only managed. This includes genocide, forced mass population movements, partition/secession and integration/assimilation.

Genocide is the deliberate killing of a *genos*/kind.³⁶⁴ It is extreme systematic mass killing of an ethnic community. It also involves the indirect termination of the socio-biological production of an ethnic group. Forced mass population movements³⁶⁵ occur when one ethnic group is transplanted from its homeland to live elsewhere. It is usually implemented during civil wars and championed/when faced with a perceived threat of ethnic swamping. It is also done in response to economic depressions. It facilitates genocide of vulnerable populations. Victims may suffer from famine, or have rights violated. Partition/secession³⁶⁶ allows self-determination and can produce violence as it may lead to involuntary population movement; large populations can be massacred while on the move. The proposal to secede can lead to war. Integration and assimilation eliminates ethnic conflict through integration of ethnic groups into new communities. Integration policies reduce differences, e.g. attending same schools, new language and laws against discrimination etc. Assimilation is the merging of ethnic identity and aimed at people willing to be assimilated. With assimilation if one group benefits over the other this can lead to annexation and ethnocide.

V. MODERN ETHNIC CONFLICT MANAGEMENT MECHANISMS

Democratisation can provide opportunities for ethnic conflict management and also the expansion of ethnic conflict. Glickman³⁶⁷ argues that ethnic conflict is the manipulation or assertion of group rights.

Various methods can be used to manage ethnic conflict. These include confidence building measures, hegemonic control, third-party intervention,

363 See John McGarry, *The Politics of Ethnic Conflict Regulation: Case Studies of Protracted Ethnic Conflicts*, (London and New York: Routledge, 1993).

364 See Raphael Lemkin, *Axis Rule In Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, (Washington DC: Carnegie Endowment for World Peace, 1944) For the first use of the term genocide and also see the *Convention on the Prevention and Punishment of the Crime of Genocide Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948*.

365 See Donald Horowitz, *Ethnic Groups in Conflict*, (Berkeley: University of California Press 1985).

366 See James Mayall, *Nationalism and International Society*, (Cambridge: Cambridge University Press, 1990).

367 See Harvey Glickman (ed) *Ethnic Conflict and Democratization in Africa*, (Atlanta: African Studies Association Press, 1995).

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external intervention (coercive and non-coercive) and cantonization/federalism, power-sharing and autonomous regimes.

Confidence-building measures seek to reassure ethnic peoples about their future and must be appropriate to the needs of those who feel vulnerable to the majority-backed state. Unless each side views its opponent as honourable and having legitimate interests, relations are likely to be marred by a history of ethnic conflict.

Secondly, if power-sharing is unequal in the confidence-building measures then ethnic conflict could reoccur. Power-sharing has four main features: grand coalitions, proportional representations, community autonomy and constitutional vetoes for minorities. It secures rights, identities, freedoms and equality. Power-sharing only works if ethnic groups refrain from assimilation, successive generations of leaders have the right motivations, and leaders are able to make compromises. Power-sharing works in moderately divided societies rather than deeply divided ones. Although elections represent only a brief episode in a larger political process, they have an enormous influence on inter-group collaboration and conflict. Where unfavourable circumstances prevail, such as agreement on the rules of the political game, broad participation in the voting process and a promising economic environment and elections can provide instability.

Regional autonomy and federalism is an important part of confidence-building measures because political and administrative decentralisation can play a role in managing political conflict but it can also reinforce ethnic misperceptions, stereotypes and exclusivity.

Hegemonic control involves elite control and coercive domination. It may make ethnic conflict worse as in the case of apartheid South and Africa, pre-genocide Rwanda.³⁶⁸ If states fail to restrain the incentives for violence rooted in the strategic interactions of groups, it is necessary to turn to the international environment and ask whether external intervention can safeguard minorities against their worst fears.

External intervention may alter the internal balance of ethnic power and lead groups to moderate their demands. Secondly, the primary effect of intervention is to provide guarantees for new ethnic contracts between warring parties, at least

368 Anthony D Smith, *'State Making and Nation building' in States in History* ed By John A Hall, (Oxford: Basil Blackwell, 1986) page 230.

during an interim period. The problem is that the intervention is foreign and may not take into account the variables on the ground e.g. UNISOM in Somalia.

These modern conflict management methods are also considered defective owing to the persistence of conflict on the continent. Difficulties in implementation also arise as they are considered non-African and alien.

VI. TRADITIONAL MECHANISMS FOR CONFLICT MANAGEMENT

Traditional mechanisms for conflict management are found in past social formations and are applied to conflicts. What is important about these mechanisms is the indigenous content of the social structure. The traditional mechanisms found in Africa are strikingly similar owing to the common social formations of societies but their institutional manifestations are localised. Many of the traditional mechanisms have not been documented but this does not detract from their applicability. They are usually couched in rituals that are significant for the communities and hence their seriousness and continued observance.

These traditional strategies are hinged on the balance of interests among the groups in the community. The mechanisms greatly emphasise solidarity in the community (greatly) as well as a value consensus based on shared history, custom and relationships. Conflicts are managed by the community.

Many of the practices associated with traditional conflict management are mediation and negotiation within a community of relationships and values. Mediators usually get their authority from old age, religious roles and personal qualities.³⁶⁹

Traditional methods have worked with varying degrees of success. Indeed, the idea of community is central to traditional conflict management techniques. Their success also depends on integrative values and the building of relationships. Traditional conflict management mechanisms usually reflect principals of reconciliation and reintegration rather than retribution and exclusion. Communities share in the responsibility even if one member is to blame. The culprit is a victim and the community takes charge. The community also ensures the reintegration of the victim into society to guarantee a return to normalcy and reconciliation. They are based on long-standing relationships, and values and norms, and are effective in both intra and inter-community conflict.

369 See Saadia Touval and William Zartman, *International Mediation in Theory and Practice*, (Boulder: Westview Press, 1985).

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It is important to note that the term 'tradition' usually obscures their key characteristics and their effectiveness. It may be argued that traditional mechanisms can only be used in simple disputes but this argument goes against the idea of internationalisation of internal conflicts. The applicability of traditional strategies has been in decline in some areas owing to corruption and the abuse of traditional structures.

Contemporary ethnic conflicts in Africa are associated with socio-political changes and an erosion of traditions, authority, values and the idea of community. The persistence of conflict on the African continent may indicate that the traditional methods are not sufficient in themselves manage conflict.

Although there is a persistence of conflict, in the last few years Africa has also witnessed a subsiding of conflict in states like DRC, Sierra Leone, Angola, Rwanda, Burundi, Eritrea and Ethiopia. There is no guarantee that these conflicts will not flare up again. However, it is important to note the positive effect of African initiatives in combination with international organizations and nations. This relationship is critical in efforts to manage and prevent conflicts in Africa. At the end of the Cold War and the emergent new world (dis)order, Africa has increasingly become marginalized. Middle East and European problems have monopolized the attention of the sole superpower and the war on terrorism has further pushed Africa to the periphery. With the division of labour owing to the formation of regional organizations there is less intervention from outside Africa and more from within Africa.³⁷⁰ African regimes have also started intervening in other African conflicts. Some have done so to improve their image while others are trying to negate threats to their own countries through the spill-over effects of conflicts.³⁷¹

After decades of neglect, domestic variables are now being used to explain sources of international conflict at societal level. The Kantian liberal theory of democratic peace has led to conflict analysis of intrastate wars.³⁷² Democratic culture and norms suggest that democratic states are inherently adverse to war, and norms of peaceful conflict resolutions evolve within democratic political cultures. An analysis of individual theories used to explain individual level sources of

370 See Festus Aboagye (ed) *ECOMOG: A Sub regional Experience in Conflict Resolution, Management and Peacekeeping in Liberia*, (Oxford: African Books Collective, 1999).

371 Norrie McQueen 'Angola' in *African Interventionist States*, ed by Oliver Furley and Roy May (Aldershot: Ashgate, 2001) pages 93-117.

372 Kant Immanuel 'Eternal Peace', in *The Philosophy of Kant: Immanuel Kant's Moral and Political Writings*, ed. by Carl J Friedrich (New York: Modern Library, 1949), pages 261-62.

international conflict demonstrate that political leaders' belief systems, psychological processes and decision-making modes, personalities and emotional factors can affect foreign policy behaviour.³⁷³ Explanations based on misperception are also often seen as necessary causes of war.

It is therefore important to note the movement towards finding solutions to African conflicts within the continent and within the state. This provides an opportunity for the use of traditional mechanisms in combination with modern methods of resolving modern conflicts. Of importance is the indigenous content, methods, principles of reconciliation and reintegration and the upholding of the community and shared values.

VII. CASE STUDY OF SOMALILAND

INTRODUCTION

The case of the Somali spells out in the greatest detail the traditional mechanisms that were used in the Somali community.³⁷⁴

Most African countries are diverse peoples in search of a sense of national identity but Somalia was always considered an exception to the rest of Africa owing to its extraordinary ethnic, cultural, religious and linguistic homogeneity. Somalis speak the Cushitic language and adhere to the same Islamic religion. Clashes of identity in Somali are witnessed between different clans, religious orders (tarriqqa) and livelihoods, and between the nomads (Samale) and the settlers (Sab). The supremacy of the nomad has been enshrined in the camel and the name Samale, modified into Somali.³⁷⁵ This led to the description of Somali as a nation without a state. The Somalis were already a people with a national identity in search of territorial unification.³⁷⁶

The Somali homogeneity has been transformed into clans, sub-clans and political factions, and the negative dispensation has led to the dissolution of the state and the nation into clanism. It is these subsidiary fissions of religious orders and livelihoods that explain why a homogeneous group like this is divided into

373 Ole Holsti 'Cognitive Dynamics and Images of the Enemy' in John Farrell and Asa Smith (ed) *Images and Reality in World Politics*, (New York: Columbia University Press 1967) pages 16-39.

374 Frank Muhereza, 'Conflict Prevention, Management and Resolution: Capacity Assessment Study for the IGAD Sub region -Phase 2: Implementation', Reports by National Experts: Uganda (UK, University of Leeds, Conflict Disaster and Management Group, Centre for development Studies, 2001).

375 Maria Brons, *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness* (Utrecht: International Books, 2001) pages 89-95.

376 Ali Mazrui, *The Africans: A Triple Heritage* (New York: Little Brown and Company, 1986).

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irreconcilable factions. The breakdown of the social fabric into clans may be seen as a natural process where the clan is the basic unit of organization. On the other hand, it is clear that the clan system, as elsewhere on the African continent, has always promoted collective solidarity and individual identification. Thus the practice of the clan system does not threaten the existence of the state and national unity.³⁷⁷

Two political tendencies have been witnessed in Somali since independence: communitarianism (effective public service and human rights protection) and sectarianism (corruption and favouritism). Applied sectarianism led to politicized clanism, where conflicts arose between elites who made use of clans. Since the 1960s the conflict was based on clan jealousies. The Somali case demonstrates how misappropriation of public resources, sectarian use of identity politics and lack of democracy can lead to state collapse. Communal wars over resources have ravaged the country especially in the South where farmers (Sab) have been forced from their lands.³⁷⁸ Siad Barre was ousted in 1991 and different clans claimed parts of Somali with each sphere of influence being led by a warlord who armed his supporters. The problem of clanism was further compounded with disputes over land ownership.

Communal segregation has replaced integrationist patterns, thus making it very difficult for peace and trust to prevail. Further, stateless Somalia has become a major small arms market and conduit for the entire region. The proliferation of small arms and light weapons has exacerbated conflicts in Somali and in the Horn Region. A large part of Somali is still characterized by conflict and anarchy despite peace talks and the formation of a government. Some regions know peace and stability with Puntland in the North East, and Juba land in the South West having set up semi-autonomous regimes.

Management initiatives have been varied, from the UN, the USA, IGAD, and NGO efforts to local grass roots. It is important to mobilize indigenous capacities for peace-building in Somali.³⁷⁹

377 Khalif Hassan Ahmed, 'Somali: A Nation in Search of a State' in, *In Quest for a Culture of Peace in the IGAD Region*, (Nairobi: Heinrich Boll Foundation, 2006) pages 163-191 (page 164).

378 See Catherine Besteman and Lee Cassanelli (eds), *The Struggle for Land in Southern Somalia: The War Behind the War* (Boulder, West View Press, 1996).

379 See Henrich Wolfgang, *Building the Peace: Experiences of Collaborative Peace building in Somalia* (Uppsala: LPI, 1997) and See also Walter Clarke and Jeffrey Herbst, *Learning from Somalia: The lessons of Armed Humanitarian Intervention* (Boulder: Westview Press, 1997).

This social disintegration and its challenges have tested all initiatives to resolve the Somali conflict. The outbreak of the civil war in 1988 and the total collapse of the state in 1991 led to one of the worst humanitarian crises, a massive international peacekeeping operation (UNOSOM) and local, national and international initiatives. These initiatives led to the debate on the use of a traditional/grassroots approach or modern mechanisms/top down approach for conflict management.

SOMALIA'S TRADITIONAL STRUCTURE

Somalia has been used to analyze the utility of traditional mechanisms of conflict management.³⁸⁰ Pre-colonial Somalia was a stateless, decentralized and nomadic society and traditional mechanisms were used to manage conflict over natural resources amongst the pastoralists. These mechanisms had some measure of success. Traditional conflict management mechanisms in Somalia have clearly defined the various actors and processes. Four key mechanisms of traditional conflict management are: the practice of *diya* payments or blood compensation, the role of clan elders, the binding power of social contracts between two lineage groups known as *xeer*, and the consultative mechanism of the *shir* or assembly.³⁸¹

Somali culture is a complex web of affiliations and at the highest level has six main families that break down into clans and sub clans. The most stable lineage unit is the *diya* paying group bound to collectively pay or receive blood compensation or *diya* if one of their members commits a crime or is a victim of a crime.³⁸² The system continues to serve as the primary structure in the judicial system where grievances like livestock raiding and murders are peacefully resolved through compensation as opposed to retaliation. Siad Barre outlawed *diya* payments but these have continued to flourish. Peer pressure and high costs of payments have ensured that social contracts are observed. Where there has been a breakdown in the negotiations feuds and counterattacks have been witnessed.

380 See Ahmed Yusuf Farah and Loan Lewis, '*Somalia: The Roots of Reconciliation: Peace-making Endeavours of Contemporary Lineage Leaders: A Survey of grass-root Peace Conferences in the North West Somalia/Somaliland*,' (London, Action Aid Report, 1993) also See Ken Menkhaus, '*International Peace Building and the Dynamics of Local and National Reconciliation in Somalia*,' *International Peace keeping*, Volume 3, Issue number 1, Spring 1996, pages 42-67 also See John Prendergast, *The Gun Talks Louder than the Voice: Somali's Continuing Cycles of Violence*, (Washington, Center of Concern, 1994)

381 Ken Menkhaus, '*Traditional Conflict Management in Contemporary Somalia*,' in *Traditional Cures for Modern Conflicts: African Conflict 'Medicine'* ed by William Zartman (Colorado: Lynne Rienner Publishers, 2000) pages 183-199 (page 184)

382 Loan Lewis, *A Modern History of Somalia: Nation and State in the Horn of Africa*, (Boulder: Westview Press, 1988) page 11.

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Clan elders are the central actors in traditional mechanisms of conflict management in Somalia. These elders include prominent adult males from each lineage group, and notable religious leaders (sheikhs or *wadads*) who have risen to a position of influence through their wisdom and negotiation techniques. The highest council of elders is called the *guurti* or *akhyaar*. In the post-colonial system elders were identified and paid in order to co-opt or replace potentially troublesome clan elders.³⁸³

In the absence of formal law enforcement in Somalia customary law (*xeer*) within and between *diya*-paying groups remains central in establishing norms and obligations. *Xeer* has some aspects of shari'a law but may be seen by some of the Islamic groups as deviating from shari'a. *Xeer* provides predictability, confidence building, and cooperation.

Consultative processes, known as traditional clan assemblies (*shir*), are relatively democratic and open as they allow all to present their views and thus provide legitimacy.

TRADITIONAL CONFLICT MANAGEMENT IN THE SOMALI CONFLICT

The Somali conflict is characterized by its protracted nature and the complete collapse of the state leading to a stateless decentralized system, but within an anarchic political environment. Since 1991, dispute mechanism, arbitration and punitive sanctions have been used at the micro level by clan elders. In areas hardest hit by the civil war and the occupation of outside militia local elders have been left powerless. Alternative sources of quasi-judicial authority, like the Islamic courts, have supplanted traditional mechanisms. Traditional mechanisms have been used extensively in Somaliland in the north and at the macro level of management of conflict in Somali at different times, but most internationally-sponsored peace conferences have largely ignored traditional mechanisms.

Traditional clan elders were ignored, marginalized, manipulated and co-opted during the Barre regime and clan elders were not used to managing conflict at the national level, yet the liberation movements were based on clan lines and the elders could have been effective in those early years of the conflict. In the North traditional processes and actors were used following the fall of the Barre regime.

The successes of traditional mechanisms of conflict management in the North are in contrast to durable reconciliation processes in the South. International efforts

383 See Ahmed Yusuf Farah and Loan Lewis, pages 14-29.

were missing in Southern Somali in the period 1991–1992 owing to bureaucratic problems, but traditional mechanisms were not used either. This is because the relations between the youth and elders were transformed owing to the proliferation of small arms and light weapons that have given the youth a sense of power and eroded the sense of respect and authority for elders. Southern Somalia was also under conquest and occupation by warring clan militias, none of which had historical claims over the land or which they fought. Local elders found themselves in the weak and difficult position of negotiating with militiamen of distant clans. Therefore traditional mechanisms were marginalized by conflict dynamics and the socio-economic situation. After UNOSOM elders were used in negotiations but some placed obstacles to the process as they did not want to lose land won during the conflict.³⁸⁴ International initiatives from 1993 ignored traditional mechanisms because meetings had to be held outside Somalia for security purposes, negotiators had to be distanced from hardliners, and the most important participants were considered those with the arms, yet they may have had no control over their constituents. Somali factions and militia were highly critical of elders and accused those pushing for the inclusion of elders as promoting clanism and backwardness in Somalia.³⁸⁵

The failure of the UN “top-down” approach, as compared to the success of the North in the use of traditional mechanisms, led to a period between May 1993 and 1994 where UN diplomats were open to the traditional approach and this produced mixed results. The most important was the Jubaland Peace Accord (June – August 1993). The factions and militia leaders of the conflict between the Ogadeni and Mijerteen and Marehan clans were left out of the peace process though the Mijerteen and Marehan kept close contact with their militia leader. The accord was a partial success as some aspects couldn’t be implemented owing to the rejection of certain clauses by faction and militia leaders. A later meeting of the *Shir* (February 1994) was disrupted by a militia leader thus leading to renewed hostilities. The change to a grass-root approach was seen increasingly as a way to counteract General Aideed who was locked in a conflict with the UN. Aideed did not want authority to be given to elders as his clan had acquired land that they had no right to. The UN sponsored local and regional peace conferences featuring traditional procedures had some success as in Afmadow, Bardhere and Baidoa, but in 1994 the UN sought to accommodate Aideed who demanded the stoppage of

384 See Ken Menkhaus, *Peace building in Collapsed States: Dynamics of Local Level Reconciliation in Somalia 1991–1995* (Lanham: Rowman and Littlefield, 1999).

385 Ken Menkhaus, ‘Traditional Conflict Management in Contemporary Somalia’, in *Traditional Cures for Modern Conflicts: African Conflict ‘Medicine’* page 193.

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“bottom-up” approaches. The UN sidelined traditional processes and this led to the eventual failure and departure of the UN forces in March 1995.

While international diplomats saw peace accords reached by traditional processes such as building blocks to national and regional peace the local communities saw the reverse as true. The national peace was only possible through local and regional accords as national processes would easily lead to conflict at the local level.

SOMALILAND

Traditional processes and actors have been at the fore of nearly all major reconciliation initiatives in the North. The greater strength of the traditional social institutions in the North may be a function of the North’s relative isolation from the socio-economic changes and urbanization imposed on the South, and the North’s greater ethnic homogeneity may be due to the small number of clans in the area and demographic stability.

The Somali National Movement which drove out the national military recognized both clan identity and the role of clan elders in its constitution.³⁸⁶ Following the outbreak of inter-clan fighting in the North in late 1991 talks were convened by the clan of elders leading to the Boroma Conference (January to May 1993), which succeeded in resolving armed conflict, compensating groups, selecting the new president for Somaliland, establishing security arrangements and resolving grazing and property disputes and establishing a National Peace Charter and *xeer* for Somaliland.³⁸⁷ In the National Charter, the Upper House is defined as a council of elders with the responsibility of safeguarding peace and creating codes of conduct (*xeer*) among clan elders.

Traditional mechanisms have also been used with success in Sanaag in Northern Somalia with seven peace meetings (held between August 1993 and June 1993). It brought four main clans together and produced an accord to institutionalize ceasefire, free movement and trade, access to water and grazing pasture and property disputes. The traditional mechanisms in Sanaag were used hand in hand with non-traditional participants like intellectuals and local NGOs, thus producing a synthesis of old and new processes. The Boroma and Sanaag processes faced problems of implementation and universal acceptance but they

386 Mark Bradbury, *The Somali Conflict: Prospects for Peace*, (London: OXFAM Publishing Company, 1994) pages 67–74.

387 Mark Bradbury, pages 67–68, 73–74.

represented two of the most durable and comprehensive peace processes undertaken in the Somali conflict.

IMPORTANT ASPECTS OF SUCCESS

The incorporation of traditional systems contextualizes conflict management and allows for the participation of locals in the search for peace. If local input is ignored external intervention in conflicts may escalate rather than deescalate the conflict.³⁸⁸ The synthesis of old and new processes goes a long way in ensuring peace and reconciliation.

Peace accords arrived at by traditional processes should not only be seen as building blocs to national and regional peace, but also an indication that national peace is possible through local and regional accords, since national processes can easily lead to conflict at the local level.

A distinction must be made between actors and processes and traditional and grass root processes. Situational analysis is important as elders are not always agents of peace. The relationship between elders and militia leaders needs to be examined carefully. Traditional mechanisms led to peace at the local and national levels, but on their own they may not lead to peace at the regional level. Local actors can empower communities and be trained in conflict prevention and management; however, they may face personal risks if the conflict escalates and there is also limited empirical analysis on their monitoring and reporting capabilities. Efforts must thus be made to integrate them into societal and national policy-making bodies.³⁸⁹

Governments should not try to take over, subordinate and even transform these traditional mechanisms as they tend to lose their effectiveness. The widespread decline of traditional mechanisms is partly owing to the fact that governments try to incorporate them in inappropriate forms and this leads to their ineffectiveness.³⁹⁰

The case of Somaliland, which has proclaimed itself a breakaway state, has achieved peace at the national level but not at the regional level. Reconciliation was seen as an end in successful traditional mechanisms and a step towards state-

388 See David Smock and Chester Crocker, *African Conflict Resolution*, (Washington: United States Institute of Peace, 1995).

389 See Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington DC: US Institute of Peace, 1997).

390 See Adebayo Adedeji (ed), *Comprehending and Mastering African Conflicts: the Search for Sustainable Peace and Good Governance*, (London: Zed Books, 1999) page 331.

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building through the “bottom-up” approach. Traditional mechanisms manage conflicts and not resolve them and are thus more realistic. They need external support as this reduces pressure on traditional mechanisms.

VIII. CONCLUSION

The combined use of traditional and modern conflict management mechanisms is a viable approach in the management of the nation- state conflict in Africa.

The Somaliland case study suggests that the incorporation of traditional systems contextualizes conflict management and allows for the participation of locals in the search for peace. Indeed the homogeneity of the clans has been a renowned traditional means of forging peace amongst the warring clans.

Somaliland has formed a hybrid system of governance combining traditional and western institutions and demonstrated that national peace is possible through local initiatives. The Somaliland case-study also demonstrates that traditional mechanisms tend to lose their effectiveness when governments take over, subordinate and even transform them.

Through its unique conflict management methodology Somaliland has successfully built itself up from the ravages of war. It has applied traditional indigenous methods to identify key issues and resolve internal conflicts and is lobbying for secession from Somalia as enshrined in Article 1 of the UN Charter. Indeed Somaliland had its own colonial frontiers inherited from Britain in June 1960 and was juridically a state before its merger with Somalia on July 1st 1960. Much of Africa's current violence is caused by conflicts arising from African states' attempts to impose their sovereignty and many African communities' resistance to such manoeuvres. The outcomes of such conflicts will necessarily force reconfigurations of both African nations and states and, ultimately, determine their position within the international system. The continuing significance of nations constituted by culturally and historically similar individuals who share both common bonds and a desire to govern themselves is not unique to Africa. However, governments of the African region need to analyze the root causes of the conflict and strengthen mechanisms already in existence in the bid to prevent and manage conflict. Official and unofficial channels should reinforce the efforts of the other and therefore create both a top-down and a bottom-up approach as advocated for in this paper.

Underlying political, economic, social and cultural factors are the root causes of conflict. Therefore structural conflict has to be managed by changing the

underlying structures that give rise to conflict. Indeed the successes or failures of building a nation state depends on the political articulation of ethnicity, the nature of governance and the representativeness of institutions. This would help transcend cultural differences and ensure the viability of the nation state project in Africa.

In general there have been well developed and successful traditional mechanisms for conflict prevention, management and resolution at regional, interstate and intrastate levels. These mechanisms should not be ignored in contemporary conflicts, especially ethnic conflict, and conflict between the nation and the state. They should be restructured and used alongside contemporary mechanisms.

Indeed it has been suggested that both the traditional and modern methods of conflict management may be sound but poorly applied.³⁹¹

391 William Zartman, 'Introduction: African Traditional Conflict "Medicine" in William Zartman (ed) *Traditional Cures for Modern Conflicts: African Conflict 'Medicine'* (Colorado, Lynne Rienner Publishers, 2000) pages 1 - 11: 4

SOMETHING IS ROTTEN IN THE STATE OF KENYA

Justus Mbae

“Something is rotten in the state of Denmark”

Shakespeare (Hamlet, the Prince of Denmark)

I. TRUE EDUCATION VERSUS SCHOOLING

One of the tragedies of modern life has been the tendency to separate an individual's personal growth (including moral development) from his/her other general achievements.¹ To judge the worth of education by considering its ability to provide gainful employment and economic advancement is to miss the true meaning and significance of education. Although it is often mistaken for means, education is, in fact, an end in itself—a moral end. As such, it is intimately associated with ethical principles of character development, human dignity, and the notion of virtue.²

By its very definition, education is a moral undertaking. To educate a person is to introduce or initiate that person into a life of value or worth³. Indeed, there is nothing like value-free or neutral education. There is something inherently of a moral nature in education. As Gerard Mannion observes “...there is a moral dimension to all that we do in education, ... and this is so whether we like it or not, or whether we are actually aware of it or not”.⁴

Sadly, not everything that goes by the name of education is in fact that. Very often, people talk of education when in fact they mean no more than socialization, schooling or simple learning. There is a very real difference between the three.

The difference between education and schooling is best seen in their end product. Unlike one who is simply learned or schooled, the educated person puts the interest of his/her community before his personal interests. He/she has learned to give back to society without expecting reward or payment. Thus the educated person routinely volunteers time, talents, or other resources for the benefit of his

1 Thomas C Hennesy (ed), *Value/Moral Education: Schools and Teachers* (New York: Pauline Press, 1979), page 1.

2 According to RS Peters and PH Hirst, education is to be associated “with the development of desirable qualities in people. (PH Hirst and RS Peters, *The Logic of Education*, (London: Routledge and Kegan Paul, 1970) page 19.

3 RS Peters, *Education as Initiation*, An Inaugural Lecture delivered at the University of London Institute of Education, 9 December 1963. Published, G Harrap, London, 1964 pages 1-48.

4 Mannion Gerard, ‘Against Expediency: The Ethics of Education’ in *Catholic Education* 11.2 (December 2007): 142(15).

community or society. When he/she takes leadership in society, it is not to be served, revered, honoured or respected by others but simply and dutifully to render service to his/her fellow men and women.

The educated person is not one who, to use Plato's metaphor of the cave,⁵ having sighted the sun and perceived her irresistible beauty, will sit there to further contemplate and enjoy the great spectacle. Rather, the truly educated person will give up the beauty of contemplation so as to return into the dark cave for the sole purpose of delivering those other prisoners who are still languishing in ignorance. In education, more than anywhere else, the saying is true "he travels furthest who reaches down to lift another up".

The educated person differs from the one merely schooled in another significant way. He/she is humbly aware of how little he/she knows as compared to what he/she could know. In part, this humility leads to the recognition that there is an Intelligent Being who is responsible for the universe and to whom man is answerable. The educated person recognizes and accepts that he/she is not that Being. This way, education helps the individual to answer the three most fundamental questions of life: (a) Who am I? (b) Where did I come from? (c) Where I am going, and how do I get there?

These are not rhetorical questions, and the answers we give to them have serious implications for our personal lives. Ultimately, the truly educated person must not only know what is good. He/she must also do the good. And in that sense, Socrates was right again, when he insisted that one cannot know the good and not do the good, because to know the good is to do the good. In that respect, therefore, to be educated is to be morally upright. That is why it would be logically contradictory to talk of an educated but immoral person, an educated but corrupt individual, an educated but socially indifferent person. Education implies morality, responsibility, concern and care for others.

II. THE MANY FACES OF VALUE EDUCATION

True education then, has more to do with the inculcation of values than the acquisition of theoretical knowledge. Throughout the history of Education, value education has taken a variety of forms taught in different ways. These range from citizenship education, to civics, social sciences, social studies, studies of society, life skills, ethics, and moral education.⁶ In many countries, values are taught through

5 William Boyd, *Plato's Republic for Today: Selected and Translated with an Educational Commentary*, (London: Heinemann, 1970), pages 121-7.

6 David Kerr, 'An Historic Shift in Policy, or Blind Leap of Faith: The Work of the Citizenship Advisory Group in

what has come to be known as citizenship education. The general aim of citizenship education is to ensure that young people grow up to be active and fair-minded citizens. In the United Kingdom, citizen education was made a compulsory cross-cultural theme in 2002.⁷ In the United States, it is taught as civics⁸ and is a curriculum area with a set of national standards. In Australia, the program named “Discovering Democracy” is federally funded and taught in all states. Most states also have active citizenship programs.⁹ In New Zealand, where citizenship education has not existed as a separate subject in the country’s curriculum, values have been covered in such subjects as history and social studies.¹⁰ Even in Canada, renewed interest in citizenship education is reported across the provinces.¹¹

In Kenya, in the late 1980s and in the 1990s, value education was taught as a separate subject on the school curriculum. With time, the subject degenerated to mere academic interest, thereby losing the opportunity to make a real difference in the student’s moral development. Social Ethics and Education (SEE) has since been dropped from the school curriculum, thus leaving a gaping vacuum in our delivery of value education.

Whether we teach it directly or indirectly through other subjects such as history, civics, and social studies, value education is important, as it helps to produce what Bertrand Russell calls a “cultured individual”. Only through such teaching can we succeed in producing “one who has acquired knowledge and skills which make him of service to society, and habits of conduct which make him agreeable in association with his fellows”¹²

England, The Journal of Social Education, 170, 2002, page 2.

7 David Kerr, pages 19-92.

8 John J Cogan, Paul Morris and Murray Print, *Civic Education in the Asia-Pacific Region: Case Studies Across Six Societies*, (Chapter 8: A comparative overview”) (Routledge, 2002) pages 167-185.

9 Kerry Kennedy (ed), *Citizenship Education and the Modern State*, (Routledge: Palmer Press, 1997). Introduction, pages 1-6.

10 Carol Mutch.: ‘*Citizenship education: does it have a place in our curriculum?*’ (Report). Curriculum Matters 1, (Annual 2005): 2005, 49 page 22.

11 Hebert Yvonne and Alan Sears: *Citizenship Education*. Report for Canadian Education Association supported by the Integration Branch and Metropolis Project at Citizenship and Immigration Canada, 2001.

(available on internet at <http://www.cea-ace.ca/res>).

12 Bertrand Russell, *Education and the Good Life* (New York: Livelight Publishing, Corp., 1954) page 254.

III. FIRST SCHOOL, FIRST TEACHERS OF VALUES

Important as the school is in teaching values, it can hardly be said to be the exclusive or only influence on moral development. By the time the child comes to school, he/she has already formed certain views about life and these views include what is right and what is wrong, what is acceptable and what is unacceptable, what is good and what is bad. Moral education begins in families and may be reinforced by faith and other institutions in the community. Schools are only one of the influences of moral development but they are a very important influence.

There is a growing interest in home schooling among enlightened parents in this country. The reason for this interest could just be the recognition that formal education as offered in our public and private schools has failed us. Home schooling recognizes that children pick up their values from their teachers and from the social environment in which they are taught. Since parents are disappointed by the product of the school system (a system in which they have invested so heavily and from which they expected so much), they are slowly turning to alternative methods of education. In this way, they hope to have a greater say, influence, control and responsibility for the moral development of their own children.

In taking the matter into their own hands, it would appear that these parents, whether consciously or not, are beginning to heed the Declaration on Education of the Second Vatican Council which in part states:

Because parents have given life to their children, they are seriously obliged to educate them and, therefore, *they are the first and primary educators*. This duty, that is educating the members of the family, is so important that, when it is lacking, it can hardly be substituted. It is then, an obligation of the parents to create an atmosphere in the family inspired by love, by piety towards God and towards man, and which favours an integrated personal and social education. *The family ... is the first school for social human virtues*, which all societies need. ...In the family they (the children), feel the first experience of a sound and healthy society of people Through the family, the children can be introduced easily into civil society The parents should consider carefully, therefore, the importance that a truly Christian family has for the life and progress of all God's creation.¹³ [Emphasis by the author]

And what starts at the family level must also be continued and deepened at the school level. The mention of love and "social human virtues" brings in a new and important dimension to education for citizenship. Many consider citizenship education to consist of no more than the usual talk of democracy, human rights,

13 From "Second Vatican Ecumenical Council, Declaration Gravissimum Educationist, 1: AAS 58, (1966) 729, quoted in *Pontifical Council for Justice and Peace: Compendium of the Social Doctrine of the Church*, Paulines Publications Africa, 2004, pages 135-8 (paragraphs 238-243).

duties and privileges of citizens. In fact, to be a good citizen is to develop particular attitudes and values towards the state and fellow citizens. Citizenship embodies the ideals that represent what a citizen ought to be and how he or she ought to live in order to enjoy the rights that the states bestow on their citizens".¹⁴

IV. VALUE EDUCATION IN KENYAN SCHOOLS

Bearing in mind the distinction between the educated and the schooled, and armed with the knowledge of the importance of citizenship/value education, we may now turn our attention to what is happening on the Kenyan front. The crucial question is whether our educational institutions are producing truly educated (read "moral") individuals or whether we are busy churning out well schooled and learned individuals who may move on to be respected professionals but who are only half-baked humans deficient in values.

While philosophers and education experts may be steeped in controversy surrounding the concepts and interpretation of citizenship education and moral education, no one doubts that these are among the most important goals of any education system. Some may even argue that the main purpose of education is to transform the learner into a fitting and useful member of a state, a country, or similar settled political community. Others see education as the process of initiating the learner into the society or community in which he/she lives.

In Kenya, two recent important events have brought the spotlight on the country's education system. The first of these events was the chaos that erupted following the disputed Presidential elections of December 2007. The ensuing developments (the happenings of January-February of 2008) literally brought this country to its knees. For the very first time in Kenya's short history, citizens of this land rose up in arms against their brothers to deliberately and intentionally destroy lives and property, rape women and girls, paralyze commerce and instil fear.

The second event was the wide-spread violent rebellion that saw more than 300 of the country's high schools go on strike in July and August and ended up with huge loss of public property and one death as students defiantly set school property on fire. These two happenings have had such serious and far-reaching consequences that many Kenyans are still trying to come to grips with their meaning and significance.

14 Hugh Barr, 'Towards a model of citizenship education: Coping with Differences in Definition' in *Democracy at Crossroads: International Perspectives on Critical, Global Citizenship Education*, ed. by C White and R Openshaw (Lanham: Lexington Books, 2005) pages 55-76.

Whatever the causes and no matter the justification of these events, it is worth noting that the main players in these sad incidents were the young people. It is safe to assume that a big proportion of these young people (sometimes estimated as high as 90%, if not more), have been through formal schooling. This raises an important question. What did we teach them? What did they learn in schools and how useful or relevant was such learning? How well has our education prepared our youth to fit in society? How well have we succeeded in transmitting important societal values to the younger generations and how well does their behaviour reflect our values as a society?

Regardless of the role that others (such as politicians and parents) may have played in these situations, it is clear that the school, and very specifically the teachers, cannot escape the blame.

The teachers have the unenviable and difficult task of shaping the character and destiny of their students. While they may not always be able to take the credit for the good they do, they will always be culpable for that which does not go right. Teachers cannot escape responsibility for the direction which things take.¹⁵ Unfortunately, there is every indication that something has gone seriously wrong with our education system and that things can only get worse unless something is done urgently to address the situation.

V. SIGNS OF MORAL DECAY OR ROT IN KENYA TODAY

There are many indications that we are in grave danger as a society but perhaps the most obvious sign that something is rotten in the state is the degree of corruption in public and private life. Every year, Kenya continues to compete for top rank in the corruption index in the world. Today, our country takes pride of place in the dubious reputation of being among the most corrupt nations on the face of the earth. The euphoria that grabbed the country in 2002 and the expectations that at last the country would be placed on a new path after years of accepting corruption and graft as a way of life turned out to be a great disappointment for most Kenyans. Grand corruption continued unchecked, with the players only becoming more daring and more subtle in their dealings. It was in this regime that the now infamous Anglo-Leasing came to light, thanks in part to one bold and courageous John Githongo.

Six years later, and almost two years into the negotiated PNU-ODM Political Coalition that saved the country from going the Rwanda way, Kenya has shown

15 RF Dearden, *The Philosophy of Primary Education. An Introduction* (Routledge and Kegan Paul, London, 1968) page 13.

no serious signs of fighting corruption. Instead, corrupt deals at all levels of society come to light with every dawning day. As I write this paper, it emerges that millions of Kenyan shillings given by donors for the purpose of resettling victims of post-electoral skirmishes, have found their way into wrong pockets, while the people for whom it was intended continue to languish in IDP camps and church compounds all over the country.

The mystery surrounding the secret sale of the Grand Regency Hotel to a Libyan company has every sign of grand corruption. So too does the irregular and grossly exaggerated contract awarded to De La Rue to print Kenya's currency. The consequent sacking and replacement of Ms Jacinta Mwatela, Deputy Governor of the Central Bank, who has in the past played a key role in exposing the rot that was the Goldenburg scandals, stinks to high heaven, and what shall we make of the Ukrainian ship that was recently hijacked by Somali pirates in the high seas? Was the military ware on this ship destined for the Kenyan Armed Forces as claimed by the Government of Kenya or were they, in fact, meant for Southern Sudan in gross violation of the UN embargo on the supply of arms for Darfur?

Hardly a week goes by without a new corruption deal coming to the surface. Corruption and graft have so permeated every sector of public life – Judiciary, Executive, Legislative, Education, and the Private Sector—that few people now dare to think things could be different. For many Kenyans, corruption is the way things have been done and the way things will be done. The incorruptible judge, the clean policeman/woman, the upright civil servant, the honest school principal, and the virtuous student are rare animals indeed.

How could our youth remain unaffected when, every year, they witness the young lives of their fellows students messed up by greed and corruption in the name of leaked national examinations at both primary and secondary school levels? What is the promise for the future? What would motivate them to keep away from buying such papers when their whole future depends on their performance in these examinations?

How could they remain unaffected when they see rot everywhere they turn, when corruption is all they see every single day of their lives? We see rot in “employers who pay their workers peanuts; policemen who execute or rape suspects and hire out their guns to thugs; magistrates who set murderers free for a bribe; teachers who give grades in exchange for sex; executives who reserve jobs for their tribesmen; investors who grab public land, pollute the environment and cheat on taxes; medical staff who chat on their mobile phones as patients writhe in pain unattended; journalists who seek cash for stories; butchers who tamper with

the scales to con customers; greedy *matatu* (taxi) crew who raise fares on a whim”.

Another sign that all is not well in our society has to do with disobedience, rebellion and disrespect for law, elders, seniors and authority. Perhaps the best example here would be the recent wave of school strikes that swept through Kenya's high schools in the months of July and August. In this activity, which resulted in the loss of public property worth many millions, many injuries, and at least one death, students defied their teachers and threatened to kill some of the principals. One school stood out in its defiance to authority. Queen of Apostles Seminary is not an ordinary secondary school. It is a school which was founded for the purpose of preparing young people to join the priesthood and serve the Catholic Church in that capacity. Cardinal John Njue, the head of the Catholic Church in Nairobi, visited the school and appealed to the boys to remain calm and not follow the way of so many other schools that had gone on strike and been closed down. In what many people perceived to be the highest disrespect and defiance to Church authority, that same evening the boys, went on the rampage, burnt down their dormitory and destroyed school property. This case shocked many people who had never expected to witness such rebellion among the youth.

In a related matter outside the school, a young high school girl in Kibera recently stabbed her father to death following a disagreement concerning the use of television. While the father wanted to watch football match between a local and a visiting team, the girl was bent on watching her favourite “soap”. When the father would not give in, the girl snatched a kitchen knife and stabbed him several times in the chest, killing him almost instantly.

And this point leads us to another sign that all is not well in the state of Kenya. There has been an increase in incidents of domestic violence and abuse in our families. Cases of spouse battering are commonplace, while child abuse is nothing out of the ordinary. In Thika, a husband gouged out his wife's eyes following a domestic quarrel, while in another case a man killed his wife for serving him dinner of ugali and vegetables but no meat; elsewhere, a man wiped out his entire family of five following a quarrel with the mother of his children!!

In addition to this violence, the family is threatened by such factors as the rise of single parenthood by choice, marital infidelity, sexual permissiveness, incest, lack of moral guidance, breakdown in communication, “gay marriages”, and extreme

16 Henry Makori, (ed), ‘*Opinion: Why Christianity Fails to be 24/7 Religion in Africa*’, Catholic Information Service for Africa (CISA), <http://www.cisanewsafrika.org> Issue number 103, 8 October 2008.

materialism. In light of all these developments, parents are looking less and less like the “first teachers”, while their families are looking less and less like “the first schools” for their children.

Considering that the family is the nucleus of the society, we have every reason to worry about our future as a society.

Finally, there is the visible shift from focus on society to the individual. With the extreme materialism that has now set in, more and more people are focusing on their individual welfare as opposed to that of the society. Unfortunately, that welfare is often understood in an extremely narrow sense to mean material progress or material development, to the exclusion of all other aspects of growth and development.

VI. WHERE DID THE RAIN START BEATING US? WHAT ARE WE DOING WRONG?

To ask this question is to assume that there was a time when things were better. Yes indeed. There was such a time and that was back in history when the missionaries first introduced modern education. That education was holistic and designed to produce an all-rounded, well balanced individual—one who would be well developed physically, mentally, spiritually, socially, and psychologically. The missionaries preached salvation but it was a universal and holistic salvation. Education was seen as a means by which that salvation could be achieved.

Today, we cannot claim to be producing the kind of individuals that the missionaries envisaged. Somewhere along the way, we lost our direction. Instead of seeking that balance that makes us truly human, we fell prey to the dreaded “diploma disease”. Kenyans love certificates and the more they have, the better they feel. At school, they concentrate their efforts on academic performance to the detriment of all other aspects of development. Teachers are under immense pressure to produce acceptable academic results.

As long as a teacher produces good academic results, regardless of what else is happening or not happening at school, he/she is judged to be a good teacher. Conversely, a teacher can produce the most disciplined and best formed students, but as long as they are not top in academics, such a teacher is seen to be useless and ineffective. In our insistence on academic performance, we have forgotten the importance of educating the whole Man.

We are like the proverbial merchant who lavishly spent huge resources and wealth on his three younger wives (the body, property, and relatives) while he

completely neglected his first wife (the soul). At the end of his life, he discovered that the wife he had neglected all along was the only one who was truly loyal and faithful to him. In our schools, we, like that rich man, are pursuing the wrong wives and it is only a matter of time before we shall know the pain of regret.

Because we no longer believe in those values and because we do not mirror them in society, we have stopped teaching honesty, hard work, punctuality, integrity, truthfulness, respect for others, selflessness. Instead, all we offer today is a well wrapped gift-box labelled “academic success” but which contains no present inside.

Because teachers and parents have lost their own sense of direction, because they are no longer committed to a definite set of values, they find it difficult to direct the youth. As the Good Book reminds us, a blind man cannot direct another except into the ditch. And as they say, no one can give what they do not have!

In addition, our influence (as teachers and parents) is seriously limited by our inability to take a personal interest in our students/children. It is amazing how teachers and parents just do not care to get personal with the young people. We make no effort to get to know our students/our children and establish a personal relationship with them. Instead, we are content to relate with them in a superficial and impersonal manner. We often demand blind obedience, unquestioning loyalty and conformity from our subjects. In doing this, we often come through as distant, indifferent, cruel, inconsiderate, harsh, uncompromising or plain unreasonable. This does not endear us to those we are meant to mentor and who look up to us as role models. Little wonder that so few of our children and our students aspire to be like us when they grow up.

What else are we doing wrong? We continue to drive a wedge between theoretical learning and real life. We neglect “life education” even as we continue to teach theories and empty rhetoric to our students. We teach lots of facts but fail to integrate them in real life or to show their place in the real world. Why do we teach what we teach and what is the relevance of such teachings to the lives of our students? How does learning all this add value to their lives?

These are all the things we have done wrong. However, as they say, to acknowledge wrong is half the reparation. Here are some things that we could do to begin to repair the damage.

Some Recommendations:

- (i) Introduce/re-introduce ethics /civics/citizen education in schools

There is an urgent need to re-examine the philosophy and practice of education in Kenya today with a view to incorporating citizenship and moral education. The gap left by the scrapping of Social Ethics and Education (SEE) from the school curriculum needs to be filled without further delay.

- (ii) Develop creative and innovative ways of teaching values

In order to successfully teach values, we must begin by acknowledging that value education is about” being or becoming not about” “learning” or “knowing”. While what Paolo Freire calls the “banking” or depositing” method of education may work well with theoretical knowledge, it is totally inappropriate for teaching values. For this, we shall need to not only design a more transformative curriculum but also undertake more critical and more creative ways of teaching values.

- (iii) Introduce Compulsory Service Learning or Community Service

The surest way to teach the values and appreciation of society is to immerse the students in the problems and challenges of the community. In this way, we accord them the opportunity to serve and to identify with that society. In Kenya, only a few institutions of learning have embraced the concept of service learning, with Starehe Boys Center being an outstanding example. All educational institutions should be encouraged to adopt this approach towards learning to give back to society and to mind the welfare of the needy and the less endowed.

- (iv) Return to basics

Our educators should seriously consider a return to basic African values where human beings are seen as co-existing and interdependent and where the common or collective good takes precedence over personal or individual good¹⁷. A return to African values will go some way towards providing an answer to extractive capitalism, excessive consumerism, extreme individualism and uncontrolled materialism.

17 Ramani Naidoo, 'Corporate Governance-A Return to African Values', African Business Journal- Trade, Investment and Tender Information for Africa, Issue 14 May to August 2003 (available on internet at : <http://www.tradesafrica.com/links.asp>).

At another level, there is also need to revert to the basics of Christian teaching and values. This will help address the current dichotomy in which one encounters thousands of individuals who profess the Christian faith but whose actions and behaviour speak of another faith.

(v) Improve and enhance Teacher Education

Teachers are at the heart of moral education in schools. The effectiveness and impact of a teacher depends to a great extent on their professional training or formation. As we revamp the curriculum, we must also address the pre-service and in-service needs of our teachers. All teachers should be equipped with strong counselling skills as well as critical methods that help them to reason out logically, morally and critically.

(vi) Parents must be encouraged to take a greater interest in the education of their children.

They must be helped to see the importance of educating the “whole” person and not just insisting on academic excellence. They must also be helped to become better and more helpful parents to their children. In this respect, schools and teachers who have been taught the stages of child development could contribute significantly by organizing parental workshops/seminars for their parents. This would be particularly useful to parents who must deal with their adolescent children.

(vii) School Sponsors must play a more positive role in moral/ethics education.

Church-sponsored high schools, colleges and universities and other institutions linked to faith communities should take the lead in reviving value education. All of these institutions are founded on some ethical and theological philosophy and uphold clear value systems. If they could only remain faithful to their history and the vision of their founders, these institutions could and should show that there is an alternative to the pseudo-utilitarian thinking that currently dominates higher education.

(viii) Teachers and parents should serve as role models.

The best and most effective way of teaching values is not by talking about them but rather by living that value in a way that all can see. In the field of values more than anywhere else, the parent or teacher must walk the talk. It is a waste of time to exhort others to be honest when we ourselves are seen to be wanting. The twisted adage “do what I say, not what I do” has no place in value education. In the past, we have not only failed to set a

good example for our children but in many cases, we have positively misled and disillusioned them with our behaviour. We have been and continue to be a bad influence on our youth. Are we surprised that so few of them want to be just like us when they grow up?

VII. CONCLUSION

There are many Kenyans who would love to wish away the abominable events of December 2007, January and February 2008 and those of June–August 2008 in which our youth featured so prominently and negatively. Many of us would wish that these were only a bad dream, a nightmare. Unfortunately, these things did really happen and the wonder is that we did not see it coming.

As ugly and as unpleasant as these incidents may be, they are only the tip of the iceberg. Unless we take immediate and very deliberate action to change the direction in which our young people are headed, we may soon be witnessing worse and more intensive encounters with the youth.

Indeed, at the pace at which things are moving, it is only a matter of time until we enter the stage of total collapse of society as we know it. Happily, we need not end up in anarchy if we change that direction now.

The first step towards solving a problem is to acknowledge it. In this paper we acknowledge the existence of the problem and attempt to trace the roots of that problem. In doing so, we have pointed an accusing finger at our traditional institutions – the family, school, church and the society in general—for reneging on that very important duty of imparting values to the younger generations.

If we are to see a better Kenya, if our youth are to play a more positive role in the preservation of our society and its cherished values, these same institutions must take their duty much more seriously than they have done so far. This paper, which is by no means exhaustive, makes a few practical recommendations that could be taken to reverse the current trend and define a more positive role for our young people.

Now is the time to salvage this country from total destruction and to put her back on the path of moral and economic greatness. Now is the time to redeem our youth and secure the posterity of our country. Value education provides the way forward in this search for personal and national integrity and dignity.

EDUCATION AND THE PROBLEM OF MORAL VALUES: THE CASE OF KENYA

Christine Wanjiru Gichure

I. THE STATE OF MORAL VALUES IN KENYAN SOCIETY: AN OVERVIEW

At the beginning of 2008, Kenya was rocked by a deadly wave of sectarian violence that was sparked off by a dispute over results of December 2007's general elections. During these weeks of anarchy, we saw people who had lived peaceably together for many years take up crude weapons against their neighbours, hacking some to death, injuring scores of others, rendering hundreds of thousands homeless and destroying property worth millions of shillings.

The most horrendous incident is a case where elderly men, women and children died after a church they had sought sanctuary in was set ablaze by marauding gangs. This was proof that the worst of human passions had taken over; where hatred, vengeance, murderous instincts and sadism reigned supreme.

But whereas it may have been only a fraction of Kenyan society that engaged in this mayhem, it is safe to say that the actions of that fraction reflect the overall moral bankruptcy of our society today.

This view is corroborated by what followed on the heels of the post-election violence, where a new wave of mayhem erupted in our schools in the form of student unrest that also caused its fair share of destruction through arson and murder.

These events lead us to ask at least two pertinent questions, namely; were the people behind these depraved activities, be they leaders or followers, acting as free men? Free, not in the sense of physical bondage to someone else but rather free in the sense of having a mental capacity to understand the import of their actions on the basic principles of human good?

And in their actions, were these people really being guided by their conscience as human beings? By conscience we mean the human faculty that appeals to reason, and which is capable of guiding human beings in pursuing the good and eschewing evil.

If these actors can give affirmative answers to these questions, then we can only conclude they acted out of sheer malice. But if, on the other hand, doubt can be cast on how free they were in their actions, then we can assume their actions were not executed with malice aforethought, but probably out of ignorance.

During the period of student unrest in schools, psychologists, education administrators and political leaders who were appalled by the senseless student behaviour pointed accusing fingers at the collapse of family institutions that are supposed to instil discipline and moral values in children.

But instead of coming up with an intelligent solution, all they managed to achieve was a chorus of accusations and counter-accusations where parents blamed the school and the Church which they felt had not asserted themselves sufficiently to instil discipline and morality.

And in the ensuing debate, mostly pursued through the media, on how the sorry situation could be arrested, there emerged a general consensus that African traditional education and values should be revived to help restore discipline in a youthful society that has apparently gotten out of hand because of the influence of a reckless Western culture.

In this regard, it has since been argued with a significant force of reason that this kind of education be integrated with the social, cultural-artistic, religious and recreational life of the community in order to assist in the positive character development of the youth by inculcating in them a sense of reverence.

But all these conceded, this paper does not purport to be a corrective to the alleged moral bankruptcy dogging the Kenyan society today. It is rather an attempt to trace and identify the shortcomings of our educational system with a view to pointing out where the rain started beating us as far as humane behaviour is concerned.

Starting with a brief examination of African traditional education, the paper proceeds by examining the weak points of the system with a view to identifying the difference between comprehensive education and mere schooling. This endeavour is undertaken with the aid of a philosophical understanding of human nature and the idea of what an educated person ought to be.

Finally, the essential elements of good education are elucidated, a successful undertaking of which should enable us to identify the strengths and weaknesses of both traditional African education and post-colonial education.

Thereafter, recommendations are made towards a reformulation of our education curriculum that would yield a more comprehensive education system capable of entrenching a wider range of values in the youth. Among these recommendations, reverence as an ancient virtue in all world cultures is emphasized.

II. MORAL VALUES IN EDUCATION: TRADITIONAL AFRICAN EDUCATION VERSUS PRESENT AFRICAN SCHOOLING

Reverence is a well understood, greatly appreciated human virtue but one which defies easy definition. It subsumes the best human values in all world cultures, and it has been demonstrated that when reverence starts to decline in a society, that society faces imminent collapse.

So important is this subtle virtue that in the ancient Greek educational system, it was included in the oath of allegiance that all Greek teenagers took at the age of 17. Reverence was inculcated in these youths in much the same way that many African societies subjected their youths of similar age to various oaths of allegiance as part and parcel of the rite of passage from childhood to adulthood. The Athenian oath reads as follows:

- (i) We will never bring disgrace on this our City by an act of dishonesty or cowardice.
- (ii) We will fight for the ideals and Sacred Things of the City both alone and with many.
- (iii) We will revere and obey the City's laws, and will do our best to incite a like reverence and respect in those above us who are prone to annul them or set them at naught.
- (v) We will strive increasingly to quicken the public's sense of civic duty.
- (vi) Thus in all these ways we will transmit this City, not only not less, but greater and more beautiful than it was transmitted to us.

Like the Greeks, scholars in educational matters concur that African traditional education systems also instilled high moral values in their youth as a way of ensuring a responsible posterity. Unfortunately, historical factors that came in the form of social contact with other cultures undermined that education system, replacing it with a system that alienates the youth from their native culture.

The usual culprit blamed for the erosion of African traditional systems is colonialism, which indeed made nonsense of the native educational system by replacing it with one that is driven by a libertarian agenda where personal freedoms are given a higher premium over societal ties.

In a brief synopsis of this issue, Jesse Mugambi compares traditional African education, its method and aims, with what he calls modern schooling and its methods as follows:¹

1 Jesse Mugambi (2008).

TRADITIONAL AFRICAN EDUCATION POST-COLONIAL AFRICAN SCHOOLING

Place of Learning → Home	Place of Learning → School and College
Teachers → Parents and Relatives	Teachers → Professionals
Knowledge Content → distilled from the African Heritage	Knowledge → Content: Imported from Western culture
Skills → Ways and means of survival	Skills → For salaried employment
Techniques → Apprenticeship	Techniques → Theory and experiment
Pedagogy → Oral and practical	Pedagogy → Textual and theoretical
Quality Assurance → Rites of Passage	Quality Assurance → Examinations
Beliefs → From African Religious Heritage	Beliefs → From Secular philosophies
Values → Self-esteem and integrity	Values → Upward mobility
Norms → Co-operation & diligence	Norms → Competition and Opportunism
Attitudes → Caring and Sharing	Attitudes → Individualism and Exploitation
Practices → From each according to ability	Practices → According to job-description
Impact → Mutual responsibility	Impact → Selfishness and self-centredness
Consequences → To each according to need	Consequences → Corruption and inefficiency

One of the points that drew the attention of this paper from the foregoing juxtaposition is that, in essence, the aims of traditional African education as presented here are not so much different from those pursued by other known cultures of the world.

In view of this observation, the following question suffices; whereas it is easy to accept that the values on the right hand column are not sufficient for a holistic moulding of the human person, are those listed on the left hand sufficient for the comprehensive moulding of the human person?

But whatever the merits or demerits of either list of values, what comes out clearly in both columns is that education, no matter what form it takes, always aims at producing a certain kind of human being. That aim is what makes the difference.

Historically, that aim is diverse; for some it was honour and excellence in warfare, for others it was the pious person, while for some, especially in modern times, it has often been simply getting wealthy.² Underlying all these models, however, there is always a political regime that needs a certain type of citizen to fulfil its fundamental principles. The nobility or dignity of those principles has much to do with the outcome of the educational system and the moral values that ensue from it.

An educational system may want to form a certain kind of human being and yet fail to do so if this intention is not explicit within the curriculum. For example, a curriculum that lays all the emphasis on scientific and professional education may, in practice, fail to impart human values. On the other hand, a system that lays all the emphasis on authority and fear of the ancestors may fail to develop the powers of the will and the use of personal freedom and responsibility in such a way that if the subjects thus educated are, for whatever reason, uprooted from the milieu of their culture, they become unable to carry over the values of their traditional education to the new set-up.

It is the understanding of human values that creates the right balance between economy and wealth creation, human dignity and interpersonal relations. Consequently, an education that fails to establish this balance becomes reductive, in the sense that it fails to comprehensively mould its learners to become positively acceptable citizens.

It is thus important to note that in the debate of how a society can return to traditional moral values, one thing that is often overlooked is the fact that the model of education associated to moral formation in traditional African societies rests on the assumption of a small-scale homogeneous society where authority is passed down through many generations.

2 Bloom, 1989.

In such a set-up, rules are expected to be followed, and the number of people to whom the rules apply is limited by family, class, gender, geography, ethnicity, or political boundaries. In such tight societies, moral obligation is easy because it is the authorities (elders, in the case of Africa) who define the rules of social interaction. In this chain of moral command, people know to whom they are tied and consequently to whom they have obligations.³ Moral values are therefore based not on rationality but on local custom or conventionality. But with more exposure to other forms of education, youth are bound to start questioning certain traditions and customs and, as a result, the conventional morality that underpins those values is bound to get weaker in the absence of cogent reasons for doing certain things.

And here lies the difference between custom and morality. Custom means the way we do things, whereas morality is behaviour that flows from a rationally calculated process. This is what philosophers who grew up in the tradition of Socrates refer to as the 'examined life'.

(a) Moral values in Traditional African Education

The aim of African traditional education was to mould the youth in such a way that they would always know what was expected of them in society, and entailed inculcating cultural values from a tender age. An important aspect of that education was reverence for the elders and the sacred.

The youth learnt that certain actions were always wrong and therefore taboo and that ignorance did not exempt one from the consequences of transgression of those values.

J.S. Mbiti⁴ identifies as the most grievous violations such acts as murder, robbery, incest, and disrespect for elders, refusal to take care of them, neglect of widows, and most especially, carelessness or negligence in offering sacrifices and libations to God and to the ancestors during festivals. All these actions constituted the overreaching virtue of reverence.

The inculcation of these values was specifically imbued with a religious conscientiousness which in turn impacted on everything the people did. Religion, or the sense of the sacred, permeated their whole lives; their economic and social activities, the way they lived their family lives, divided and shared work, educated their children, treated illness, disposed of the dead, and related with God and the

3 Power, 2006.

4 JS Mbiti (1990).

living dead. This mix of practices, the African world-view, furnished the people thus educated with mechanisms that helped them understand their world.

In most parts of Africa, and certainly Kenya, there has always been the belief that the universe is a hierarchy of divine, spirit, human, animate and inanimate elements, directly interacting. Some elements in this hierarchy are visible, others are not. These elements were understood as corresponding to the visible and invisible spheres of the universe; the visible world being composed of creation—including humanity, plants, animals and inanimate beings—and the invisible world being the sphere of God, the ancestors, and the spirits. At the top of the hierarchy of the universe is the Divine Force, God the creator and sustainer, the Holy One.

It was also the belief that God does not only encourage commitment, but demands it. No one questioned or debated God's ultimate powers. It was taken as settled that it is because of the place that God occupies in the universal order of things that human beings can even speak of their own existence, let alone their tradition⁵. To God was owed the greatest possible reverence, even though it was not generally thought He would get directly involved in their day-to-day affairs. This role was thought to belong to the ancestors and the living dead. The aim of African education was the transmission of this worldview that formed the grid of life.

An interesting similarity exists between Aristotle's principle of practical reasonableness and African traditional wisdom regarding the teaching of right and wrong. Aristotle held that ethics can only be usefully discussed with experienced and mature people. Hence, age—the elders—is a necessary, though not sufficient, condition for the required wisdom and maturity to be able to live ethically.⁶

Similarly, traditional African wisdom held that the young must go through a process of inculturation through which the values and administrative wisdom of the ancestors would be passed on to them. This task belonged to all adults, but first and foremost to the extended family. Together with the family, every person, except perhaps the wickedest wizards and witches, knew that he or she had a continuous teaching role with regard to every child or young person. A badly behaved child could therefore be corrected by any adult; it was his responsibility to do so!

Reverence for authority (including the teachers, of course) was of utmost importance. Its observance was facilitated by the judicial system in which law and morality were identical. Breaking the social mores amounted to breaking the law,

5 (Magesa 1997 pages 39–40).

6 (NE, I1094b28:12).

and breaking the law meant isolating oneself from one's community. Consequently, there was a strong sense of justice whose administration was a prerogative of the council of elders who wielded executive, judiciary and legislative authority all rolled in one.

One of the most important functions of the elders was the creation of social harmony by promoting a spirit of sharing and communal responsibility. Irreverence constituted one of the most serious offences especially because the judgment regarding the seriousness of any of the other offences, would often be based on the extent of irreverence committed. Sexual wrongdoings, for example, were also taken seriously on account of the irreverence committed. Once a sentence was made, the punishment consisting mostly in the payment of a fine affected not only the offender but also the whole of his family. Despite having no prisons or prison warders, it is worthy of note that the sentences were unfailingly carried out. One explanation of this obedience was the obligation (reverence) to the 'supernatural', for to disobey the elders would anger the living dead, and that was tantamount to plunging one's people into calamity and dishonour.

(b) Integrated education

Dialogue, rituals, symbols and the communal exercises carried out within one's own age-set at the different rites of passage played an important role in the educational process. For example, the initiation to adulthood and concomitant circumcision, preparation for marriage and the begetting of children, the rites of passage to senior elder status, were the tool by which young people got to discover their potential as well as their internal and external limitations, either as individuals or as groups. Rites symbolised beliefs in the form of cultural-religious ceremonies. There were rites to mark important family and social events such as birth, the coming of age or initiation, marriage and death⁷. Other rites acknowledged blessings such as rain after a drought, during planting, the harvest, or the completion of a new home. Through rituals elders obtained powers, including the power to offer sacrifices to God—whose intervention was sought against famine, floods and epidemics. More often they had to contend with trying to placate the living dead and the ancestors. Rituals, therefore, served to bring order, direction, and a sense of identity to the people. Let us remember that identity was always that of small communities, not that of a nation. The nation-state did not yet exist.

Besides symbols and rites, an important tool of education was '*orature*' that includes proverbs, storytelling, songs and sayings. Proverbs and riddles are two

7 (Power, 2006).

closely related forms of didactic literature in statement and questioning form. In the past, and up to today for some African communities, proverbs and sayings are a way of life. They touch on every aspect of the life of the people. There were proverbs on political, social, educational, religious and economic issues. There are those which have been passed down from one person to the other for generations. Then there are others that arise from the new situations and current lifestyles and experiences of our time.⁸

In African traditional education '*orature*' played an important role in the initiation and inculturation of young people. They were taught to observe and to compare. They reflected the participatory character of life, thereby encouraging the young people to explore a given experience in the light of another related experience. As the youths graduated into full manhood or womanhood in their age-sets, knowledge of proverbs was part of their education⁹. The young, and even not so young, drew from the proverb the necessary wisdom to enable them to answer the question: 'how ought we to live'? How ought we to behave in various social circumstances and activities? This, as we shall see shortly, is the fundamental question of education, and within that education, ethics whose role is to examine principles and rules that might help us to decide how to act, as well as to examine the traits or virtues that constitute an ideal life: the 'life worth living' as Socrates put it.

In his essay on and contemporary life, Sango Mwanahewa,¹⁰ says of proverbs that they may not necessarily follow a sophisticated or scientific logical sequence, but their magic consists in the artistic arrangement of words which enables their user to attain the set objective. That objective is to communicate some important teaching convincingly. To do so, the proverb must be brief, logical, authentic and rational. It must be exposed tactfully, and contain much wisdom within very few words. As the sole instrument traditionally available to illiterate people, in Africa proverbs were designed carefully using all the time necessary to think them out, polish, fine tune and embellish their musicality. It was also necessary to compare each proverb with its possible opposite or negation, and think out a counter proverb that would answer the first proverb and still match its wisdom. Hence, says Mwanahewa, the force of the proverb resides not in the pen but in the tongue.¹¹

8 (Odaga, 1984 in Asenath 1995: page 68).

9 Shorter 1987:50 and Sybertz, 1995:40).

10 African Logical Heritage and Contemporary Life, Sango Mwanahewa (1992).

11 *Ibid.*

By their very definition proverbs are supposed to play a quadruple function, namely, expose faults of language so that people become aware of them and thereby correct themselves; dissuade people from becoming victims of those faults as they see them committed by others, and hence not to commit those same faults themselves; to provide moral lessons, and as a challenge to make people think carefully and evaluate what they hear before taking action.¹² Modern education calls this Creative Thinking. The proverb, therefore, exhorted or dissuaded from undesirable action through a deliberative mode. It approved or condemned certain actions through the judicial mode, and indicated what is honourable or shameful in a person through the demonstrative mode.

(c) Erosion of African Values Education

Foreign cultures, through colonial rule, introduced to Africa a social, legal, economic and religious transformation. They introduced a written legal system, a monetary economy and languages that now facilitate communication throughout the continent. But for the new system to function, some old practices were forced out and finally rendered obsolete. Much time would need to pass before the Christian missionaries and the Africans reached a point of clear distinction between what was good in African beliefs and practices and what was not; between morals and taboo, superstition and true reverence of God as a totally powerful yet loving and merciful Being. Thus, the process of 'civilisation' ultimately meant the disabling of traditional leadership patterns where the elders fulfilled the double roles of judiciary and priesthood. Its replacement produced a fragmented value system with morality and religious practices in one sphere, law and judicial matters in another, and economic and social affairs in yet a third. Within a century people, even from the same family, but from different generations could not understand each others' values any more.

Therefore, the crisis of public morality we witness in Kenya could be said not to have stemmed so much from it having 'modernized' as from having abandoned and debunked the supernatural from education and daily life. In addition there appears to be the misconception that the moral values taught by Christianity are not as threatening as the old ones and, moreover, their observation and obligation is individualised rather than communal.

Once the ties that bound one to a certain behaviour became inconsequential, the socio-cultural and moral order were also weakened. For example, in the new order an individual believed to have committed an offence must first be caught,

12 (Mwanahewa, 1992:-3).

taken to court and charged. In the new system, the living dead are not feared, and so it is assumed that no one else suffers except the culprit. In addition, there is the possibility of the distortion of the Christian teaching of a merciful God who forgives. With the supernatural underpinning removed, the values first get relativized and then utilitarianized. To exacerbate the situation, there is the fact of globalization, with its secular technological rationality from which an aspiring African young professional imbibes the individualistic principle of 'self-interest'.

The pattern of education followed in most parts of Africa today was inherited from the Western countries to which they were affiliated during the colonial era. Whether this model of education or any African model in the past imparted comprehensive education depends on the vision it has of the educated person, and the principles that underlie its curriculum. If those principles are in tandem with objective human holistic formation, the outcome will be a values-laden society. But, if the principles guiding its curriculum are defective, superficial or simply wealth-geared, the product will be a selfish, greedy and amoral society.

The Western formal education that Africa inherited originated from the Greeks. The Greeks believed that education was a process of preparing the youth for civilized life in the city-state or the *polis*. The city-state was the prototype of civilization and development. Hence, in order to fit there it was essential to first 'knock off' the primitiveness or rawness of our animal nature and thereby draw out the human element in the learner. That process which the Latins later called *educere* would be entrusted to a *paidagogus*, which literally meant the person who walks with the child. The 'walk' was the process of preparing the child for a truly 'human' life, a life befitting a rational being. For the Greeks, that education or *paideia* was education for perfect citizenship.

Unlike *paideia* education, the educational systems which many centuries later claim to be descendant from the Greek pattern are very far from it. This is what Mugambi calls mere schooling. The main emphasis of present day education everywhere, even outside Africa, is that of 'useful' knowledge, that is to say, knowledge that can be utilized for immediate day-to-day human advantage.

The curricula for such education generally tend to be predominantly examination-oriented, yet other human needs that also require an education are not provided for in a purely technological-oriented education. In this way, we end up receiving and imparting knowledge that leaves entire areas of the human person 'uneducated', while giving the impression that the more technological and scientific education people get, the more educated they become.

This unfortunately happens due to the often misplaced priorities of our educational system. If we are to navigate skilfully the turbulent waters of our society, we need to look beyond utility and start planning to educate students not only to process information effectively, but also to think and judge wisely and well; in a word, to live ‘an examined life’. Neither the African traditional system nor the colonial and post-colonial systems adequately provide for this type of education. Perhaps a combination of the best from both is what Kenya needs today.

III. THE IDEA OF AN EDUCATED PERSON

Who is an educated person, or better still, who is a well educated man or woman? The first idea that might spring to one’s mind is the picture of a well-mannered, nicely spoken person who knows many things. This is because we tend to associate the possession of certain social graces and intellectual capacities with being educated. But social graces alone do not qualify one for the notion of well-educated, neither does knowledge without those either. The notion of an educated person implicitly excludes non-courteous, callous and brutal behaviour. Hence, Peters, a renowned philosopher of education cautions that:

*An educated man is one whose form of life, as exhibited in his conduct, the activities to which he is committed, his judgements, and feelings, is thought to be desirable*¹³

And what are these desirable things? Desirable things range from virtue to such things as passion for poetry, nuances of style and argument, objectivity towards facts, respect for persons, and so on. By contrast, undesirable are such things as partisan allegiances, contempt for people of different persuasions, bad manners, class consciousness and trivial things such as mannerisms, tone of voice, gestures, none of which depict an educated person.

All major classic philosophers of education defined it in terms of its ‘perfective features’. Even when they do not explicitly mention the word ‘perfection’ it is implied in the concept of education itself. Plato, Aristotle, Aquinas all refer to education in terms of its perfective aim such as: achieving goodness (Plato), man reaching his proper goal (Aristotle) or as a process of arriving at true human fulfilment (Aquinas).

For Socrates, to educate is to help another person realize his or her natural potential through the activation of the faculties that define him as human. He used the simile of midwifery to describe this phenomenon. For him as for the others, education should perfect its possessor internally and that perfection will necessarily

13 (Peters: 1976:9).

manifest itself externally. Education should reach deep inside, feeding the growth of habits and lifestyles that make a person what he or she is (Garcia Hoz, 1979)

This process is much more akin to the idea of rearing or bringing up a person. Bringing someone up, as all parents know, is a twofold process. On one hand, it involves nourishing and putting things into the child (milk, food, word); on the other hand, it requires giving the child room to grow by allowing his internal powers to develop and expand. The externals which we expect to find in a well educated person come as a result of the 'drawing out' (*educere*) of the finest qualities of the individual; it is not a question of the externals only nor of pure 'economic utility'.

Nowadays schools abound with programs for capacity building. In a strict sense, any true education should be 'capacity' building because the whole idea of educating is to *capacitate* the individual to attain his natural end. For all of us, that end is happiness. Education acts in the service of the person: it has an immediate and mediate purpose.

"On one hand, a man takes in the cultural and moral values of a society and thereby earns the right to belong to it and to be active in it; on the other, he develops his individual characteristics which set him off from the rest, allowing him to experiment with his own possibilities, find out his own limitations and choose the type of activity and milieu that suit him best" (Garcia Hoz 1979).

This explains why certain theorists of education such as Giussani refer to it as "helping the human soul enter into the totality of the real" (2001:105). To achieve this lofty goal entails the availability of comprehensive education or quality education.

An education is comprehensive when it meets the needs of the whole person. In order to do so it is necessary to work on two fronts: first, on those things that every person has in common with all other human beings because these form the basis for human unity; secondly, simultaneously work on those things that make every individual person different from all others, because these give rise to man's freedom and the rich and varied field of human endeavour. Seen in this way, education would avoid two extremes, both of them bad.

First, it poses the danger of portraying it as a tool for the production of a small, egotistical and elitist group of citizens completely out of touch with, and cut out from, other people. On the other extreme, there is the danger of using education as an instrument to make everybody think and act uniformly. Here the problem consists in the possibility that individual characteristics and responsibilities are tossed

into one large melting pot of obscure social conditioning. People act correctly, not out of conviction, but out of conditioning.

But all these conceded, education, properly speaking, starts in the family, with parents, siblings, extended family and neighbours all playing a role. During that formative period as the young person learns to operate his psycho and motor powers, he also develops appreciation for companionship, love, sharing and giving. He gets gradually socialized into the reality of who and what he is. In a sense we could say that, all along the young person runs the risk of either being educated or just simply trained to do certain things while his nurture or cultivation is left to fate. When this initial stage of education is omitted, the absence may not appear in the examination papers, but it will reflect in the person's life, in his conduct and behaviour. Comprehensive education can therefore be defined as: the cultivation of the whole person's intellectual, psychic, physical, spiritual and moral self.

But I find it interesting that the education of people should be called 'cultivation'. Anyone who has lived in a farm should appreciate this comparison. One can mentally picture the process of nurturing a plant from its earliest stages to the full grown plant. Similarly, educating entails nurturing the young towards their complete human development.

According to the on-line English Thesaurus synonyms for the term 'cultivation' are: (to care for, look after, raise, rear, foster) and to cultivate is described as: to cherish, develop, support, encourage, guide. To educate ultimately is to direct the learner towards the truth.

Hence, in the idea of the educated person we expect to find truth, nobility and clarity. We expect the educated person to be a beacon for our aspirations for a better world because we assume that he has grasped the first principles of wisdom and general knowledge. Implicit in that expectation is also refinement in self-presentation and language. Finally, we expect the educated person to be a role model of all aspects of character.

And this inevitably takes us back to the difference between education and schooling, this time in the wisdom of Peters (1976) who distinguishes various modalities that pass for education. To this end, he cautions that whereas all of them are part and parcel of it; separated, it may be difficult to achieve a comprehensive education. These modalities are: training, instruction, teaching and learning of principles, transmission of critical thought, and conversational language.

We are therefore obliged to point out that an education is mere training when its aim is simply to induct a person into the performance and mastery of some

specific actions. In training there is usually little emphasis on the underlying rationale for the actions. Instruction refers to a modality of education which concentrates simply on guided discovery or explanation of how things are done. Training and instruction alone do not produce an 'educated man'. To be comprehensive, education requires the understanding of the principles and critical thinking as observed below:

"Whatever he is trained for the educated man must have knowledge, not just knack, and an understanding of principles. His form of life must also exhibit some mastery of forms of thought and awareness, which are not harnessed purely to utilitarian or vocational purposes or completely confined to one mode.

In this respect Macintyre (1994) succinctly points out that no good education can afford to ignore moral values or to refrain from the use of that term within the academic process, because all practical sciences, beginning with pedagogy, law, economy, political science, parts of psychology and sociology are directly subordinate to moral science.

Cultivating man's faculties or potencies may seem to imply a disruption of the whole schooling process, but this is not so because:

"When you teach someone multiplication, you are cultivating his general faculty or ability to calculate; when you point out to him the beauty in a certain work of art, you are helping his aesthetic faculties to develop. So, education is working on the learner's various faculties in an immediate way, but these, in their turn, are coming together to perfect the whole human person (Garcia Hoz, 1976: page 1)

In theory all educators want to impart 'quality education'. However, not all are agreed as to what constitutes that education, its content and mode of delivery. For some, quality education means leaving the learners to discover their own values. This trend is called 'values clarification'. In this category we can mention the followers of Jean Jacques Rousseau. Its modern name is 'neutral teaching'. The adherents of this philosophy argue that our experience of reality is subjective and liable to change from culture to culture and from individual to individual, and even from moment to moment. For that reason educators should not impose any moral values on the students.

The argument sounds cogent. But was that not the problem posed by the current educational system in Kenya? Is this the correct attitude to teaching? While not denying that the argument has some merit, this argument overlooks the fact that across cultures people speak of certain things as being real, others right and good.

As regards reality, we can all agree that the chair one sits on, the food or clothing one eats or wears are real, and even if someone came along and said that they were not, that would not change the fact of their reality. In an analogous manner, actions such as robbery, assault, murder and so on remain vices and crimes even if someone was to come along and claim that they are no longer such. What makes them wrong is not the culture or the historical moment in which they happen but their significance for the human good.

Similarly, certain moral values and their opposites transcend place and time because we experience them in all societies and at different times. We condemn the violation of human life, health, private property, discrimination on account of race, ethnicity or religion on account of the human good or human rights they infringe on.

Neutral education denies the learner the opportunity to learn moral values as something stable in his life. This is lamentable because, to cite Macintyre:

“The practice of the moral virtues is central to our acquiring knowledge of them, and there is a kind of knowledge to be so acquired which is not at all produced by intellectual inquiry. We can learn what a virtue is through the experience of having our will directed by that virtue by way of connaturality (Macintyre 1994: 177)

Neutral education also alienates theoretical knowledge from life forgetting that:

The capacity for sound practical reasoning which will guide one both to judge truly and to act rightly is inseparable from an education in the exercise of the moral virtues. Hence, the misdirected or the defectively educated are incapable of learning how to exercise sound practical reasoning (*Ibid*).

IV. ‘QUALITY EDUCATION’ REQUIRES ‘LIBERAL LEARNING’ IN THE CURRICULUM

The pursuit of knowledge for purposes beyond technological or economic utility has traditionally been known as ‘Liberal Education’. At its best ‘liberal education’ is, in fact, revolutionary for it transforms students by awakening them to a fuller life of the mind and thus causes them to question their goals and values thereby making them better companions to themselves. It affords the opportunity for that ‘Examined Life’ that is worth living (Plato). This education nurtures the mind by presenting to it themes to think over, assess, judge, admire, inquire... If well planned, such an education accomplished the task of ‘knocking off’ the rawness of animal nature thereby revealing the truly human spirit that lies within. Hence in educating:

... knowledge and understanding must not be inert either in the sense that they make no difference to his (the learner's) general view of the world, his actions within it and reactions to it or in the sense that they involve no concern for the standards immanent in forms of thought and awareness, as well as the ability to attain them (Peters: 1976:9).

The aim is to 'enable' the young to develop their full human potential by providing the opportunity and occasion to reflect, investigate and discover through reading and discussions in such subjects as literature and poetry, philosophy, logic, natural science, history, natural theology. Through this type of discussion the powers that define us as human being are activated and nourished.

It is here more than anywhere else that the teacher becomes a *paidagogos*, 'one who walks with the learner', playing a similar role to that of the good farmer or the midwife. The gardener 'cultivates' by moving the soil, planting, watering, weeding, providing shade and manure but the growth belongs to the plant. Socrates' simile of midwifery describes the same process. The midwife's role is that of assistance; the baby belongs to the mother.

The risk of education consists in the confusion between education as nurture and education as mere training or schooling. In the second, the learner runs the risk of not meeting his true *telos*, the natural goal of education which is the total reality as human persons with physical, spiritual, psychological and, later, technological development.

What would one expect of quality education? Three areas stand out clearly:

(a) Quality education should capacitate one for the pursuit and love of truth

Man is described as a rational animal. But man does not come to the world with that rationality already formed. Rather, he is born with capacity to become rational, a trait he achieves to a greater or lesser extent according to the nurture he receives. Rationality refers to the ability to think, make choices and act accordingly. We further divide that power into the categories of intelligence, will and affectivity.

The intellect is the faculty of truth. All human beings seek to know and, strictly speaking, to know is to know the truth. We always want to know what is going on, the latest events, especially scandals ... A typical example of this fact is the importance we give to the news (printed and electronic). In reading we expect to be informed and hope that what is printed is true. Should we later discover that the news was simply invented by the editor, we get furious, disgruntled and distrustful in future.

That desire to know is a desire for truth, the reality of things as they stand. To know is to be one in the mind with the reality or truth. If in this quest we by chance or malice obtain contradictory or false information, we get frustrated or feel cheated. The same happens in education, except that the young learner may not at the time know that his education is a deception. An example of bad education would be a curriculum that distorts the truth or teaches hypothesis or opinion as if it was the absolute truth.

Reflection on the truth has the capacity to bring about a lot of joy in its possessor, so much so that philosophers conclude that the highest and best activity of man is the enjoyment of truth, goodness and beauty. Now, the enjoyment of truth, goodness and the beautiful is the condition we call happiness. That would mean that everything we do in life is ultimately geared towards happiness. Who of us does not aspire to obtain the highest possible happiness? We get little bits of that happiness here and there in other things, such as food, clothing, friendships, and so on; but in as much as these come to an end, they are simply a means towards an end. Similarly we all desire to have the 'most beautiful' of anything.

All these are approximations of greater truth, greater good and a more beautiful existence. An educational system that plays down this kind of education is denying the youth, during their formative years and perhaps for their entire life, the opportunity for an overall growth of all their intellectual powers. As in traditional education, the young can only discover these values through an educational process which deliberately opens the doors to them for the discovery of the 'true' 'good' and 'beautiful'.

(b) Quality education should capacitate for freedom and responsibility

Alongside knowledge the human being seeks to act. The determination to do so is the domain of the second power of our mind, the will. The will is the power that prompts one to action. We often hear it said of someone or of an institution that it lacks the will, by which it is implied that that person is either incapable of doing something or unwilling to do so. The will desires or abhors what the intellect or mind presents to it in the process of knowledge. The will is the source of human freedom. Freedom is something that stems from inside; it is not something we receive from anyone. What we can receive is liberty, the ability to move about and do our things as we wish. But freedom, properly speaking, is the power of self-determination. We are not free beings until we free ourselves inside; hence the need for proper education in freedom. Freedom is a quality of our will; it belongs to the individual rather than to the collective. Since there are many good things,

many desires, the individual needs to learn how to categorise and choose. This is the realm of morality and moral values.

The greatest danger to the education of the mind and will, itself a result of 'neutral teaching,' is relativism. Yet this is a characteristic feature of most modern education. Relativism is the claim that all truth differs from culture to culture and from person to person. Students entering the university already come with this dubious philosophy ingrained in their minds from the secondary school as the only absolute truth. At the tertiary level, unfortunately, few ever get the opportunity to test the premises on which this conclusion is derived for its validity because the university curriculum does not have scope for it. The obvious outcome is scepticism and loss of direction in important aspects of life. This makes it clear that an education devoid of a liberal component fails to be good and becomes instead a source of confusion, a hindrance to truth and, therefore, to any reverence.

(c) Quality education should capacitate for the handling of the passions (affections, sentiments and emotions)

Besides having a mind and will, the exclusively human powers, man possesses motor powers and sensibility in common with all other animals. Some of these powers are exercised at the command of the will, others are not. Man feels hungry just as other animals do. He experiences attraction and repulsion, feels love and hate, desire and aversion, fear and courage. This means that man, the rational being, has also a whole range of natural reactions that arise from his bodily or sensitive nature and which are therefore irrational. But unlike the animals, man can moderate these affections or emotions with the help of his will. This is the realm of moral virtues such as self control, considerateness, kindness and respect. Affectivity refers to the orientation of the passions and impulses in man by subjecting them to reason. The orientation of these passions also needs an education, because when they are not guided by reason man becomes unruly or acts irrationally. For that reason Plato warned about having a "lie" in our own souls about reality, a lie that we knowingly choose for ourselves. We do not want to deceive ourselves about the most important things.

We know an African proverb that says, "*Umuntu ngumuntu ngabantu*", that is to say: "a person is a person through other persons"; 'a person becomes a person through the virtues of others'. If this is true of any community it is especially so for a child. Children tend to behave according to what they observe in the family. If a family has deeply ingrained moral values the children will generally internalize those values.

“It has been observed”, says Alvira, “that many of the economic, as well as the political, crises that are to be found in many countries today are, to a large extent, a result of the lack of the moral habits of honesty, loyalty, sincerity and hard work, which can only be truly learnt in the family, and which together produce social *trust* ¹⁴. The first place to learn trust is in the family.

Inwardness is an important aspect of education. People who do not know how to appreciate or contemplate anything that is not tangible or money-oriented due to lack of a proper education become, for that same reason, less free persons in their choices. They lack criteria to guide them in their actions and priorities. Making right choices requires knowledge of the richness of life and the world around us; a knowledge which ultimately helps us to appreciate human life as embodied in the persons with whom we interact: the family, neighbours, fellow students, teachers, our leaders and people from other cultures. All of them have something we can learn. That appreciation is the root cause and source of the human values of sharing, hospitality, good neighbourliness. It is these human values that ultimately generate the cluster of virtues and values that constitute reverence.

V. CONCLUSION

We come back to where we started by revisiting the puzzle regarding the decline of moral values in today’s Kenyan society. We lamented that the basic institutions that should instil moral values in the political, educational and family units are simply trading accusations of failure to each other. We have examined both African traditional education and underscored its strengths and weaknesses and accepted that it was mostly oriented towards training and instruction rather than moulding learners towards leading an ‘examined life.’

We have also examined the modern educational system and elucidated its aims against the concept of an educated person; we have found it beneficial in some aspects and wanting in others. Now we must conclude that the society we belong to, the society we are so concerned about, is the product of this education where even at all levels, primary, secondary or tertiary, the learners leave school or college with perhaps ‘much-know-how’ within their own specialized career fields, but without having formed a clear picture of the kind of life they, as individual persons, want to live.

This paper therefore recommends that if this situation is to change, all stakeholders in education must rethink the country’s educational curriculum. These

14 (Alvira, 1994: 8).

stakeholders should include parents who are the primary educators, then the school in collaboration with parents and supported by the state through its organs for the promotion of a better future for all.

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THE IMPACT OF CONFLICT ON LEARNING IN NORTHERN UGANDA AND RWANDA

Martyn Drakard

I. INTRODUCTION

In 2008, during the normally “volatile” second term, some 300 secondary schools in Kenya experienced strikes or other forms of student disturbance. Around the same time in West Nile region of northern Uganda, there were similar symptoms of unrest, some of them quite violent and drastic. Why do our male students resort to violence, vandalism and, in extreme cases, murder? Adolescent males are among the more potentially dangerous members of society, yet why do these things not happen in more developed countries? Is this adolescent rebelliousness exhibited in other ways in the developed countries? Is the violence related to material poverty? Or is it a strong, un-worded message whose meaning is unmistakeable? That we are not happy with the way this institution is run. That is, it is simply a forceful complaint against the quality and quantity of food, the lack of teachers, the poor teaching, or the Mock exams?

Why do students resort to this senseless violence, on such a wide scale? Is it because they want to make sure the message gets out, loud and clear? Is it because this is the only “language” they understand? Have they been inadequately brought up, and the fault lies with the family? That their parents are semi-literate and do not have much interest in their children’s education? Or are these students from broken homes, or single-parent families that lack a male role model?

Is it related to the lack of example, of role models and self-control in public life? Is it “getting back at the system”, where the system is not only the school, but the whole structure of society which, according to these students, doesn’t bother about them?

Are dialogue, communication and consensus so much a part of African life, that since the modern secular education system does not incorporate them adequately, the end result is an outburst of violence over a period of time?

Who is listening to the students? Who allows them to speak? Are the schools which encourage student participation in the running of the school spared from the violence?

This paper is the result of interviews carried out in several specific areas which have been the arena of armed conflict, and attempts to invite discussion and answer some of these questions. It has been written in a simple language so as to get the

message across to a reader that is not conversant with such conflict areas in Sub-Saharan Africa.

The areas targeted are: three locations in northern Uganda, Arua, in West Nile, Gulu and Lira in northern Uganda, and Rwanda.

The people interviewed were in some way connected with education: teachers at primary and secondary levels, school heads, all with years of experience of imparting education in difficult circumstances and with good knowledge of the area where they are working; and three priests who grew up in the areas where they carry out their pastoral work.

The presentation aims to show the background of the conflict, which is different in each instance, although Gulu and Lira have been affected by the same conflict, but in different ways and to differing degrees. The actual bloodshed in Rwanda and northern Uganda was especially brutal because of the manner and motive of the killings. In Arua, the manner of the conflict was less cruel, and many people escaped into Sudan. The effects are still being felt twenty years later, although life has now begun to return to normal.

In the rest of the North, the population is just beginning to come to terms with peace again, and the long-term effects have not manifested themselves fully. However, Non-Governmental Organisations (NGOs) and faith-based groups are undertaking counselling and psycho-social therapy, although on a limited scale, but much more than happened after the conflict in West Nile. Nevertheless throughout northern Uganda, and especially among the Acholi, who have suffered most, the majority of people have shown exemplary resilience: business, trade, health and education are trying to pick up where they left off.

Many have suffered greatly. Abducted people who have returned from the bush and people with tragic experience of the displacement camps, may never recover fully; the psychological and emotional, even the physical, scars are too painful and deep. Many problems remain: land disputes, apathy and the loss of motivation and initiative brought about by camp life, family wrangles, the huge number of orphans and single mothers and reduction in the male population, and the poverty of twenty years of abandonment and unemployment.

Education has been disrupted and, consequently, suffered a loss of prestige. Young people have found alternatives to earning a living. Schools have been vandalized and used for other purposes, or displaced, and secondary classes taught on raffia mats under trees. Other students have been taught in the camps in precarious and dangerous circumstances, or have dropped out of school altogether.

Uneducated parents have needed their children to help them sustain the family. School principals and teachers have been expected to keep pace educationally with the rest of the country, in a war situation.

These have been the challenges. A lost generation has undergone a conflict which has strained the institution of the family, as well as the traditions, customs and beliefs of the community.

With the eclipse of education, thousands of young people from the region have not been exposed to the knowledge, values and ideals imparted in the school curriculum. Their notion of leadership, service and family relations has undergone a change. The emphasis has been on individual survival. Thanks to the innate strength of family values and customs, and to the helpful work of the faith-based groups and NGOs, many social values have suffered less than they could have.

This is northern Uganda, where the three sub-regions under study have many points in common: customs and cultures, and ways of solving problems.

Rwanda, however, is a different case.

1. EDUCATION

The word “education” derives from Latin, and means to “draw out”. True education aims to draw out a student’s full potential, intellectual, cultural – including aesthetic-, moral and human. It equally prepares one to take an active role in society, in the world of work (economic sphere), and in civic life (political sphere) in the exercise of his rights and duties.

Education has succeeded when young people attain the ability to discipline themselves; to feel responsible for their own lives and the needs of others; to use properly their freedom (God’s greatest gift after life), and help others use their freedom well; to relate with others and work as a team; and to go through life with a clear sense of right and wrong.

Everyone has an inalienable right to receive education, suited to their ability, gender, and national and cultural traditions, yet open to understanding other nations and cultures. The first education should be imparted in the family environment, where children learn the social virtues and how to deal with other people. It is here too that they can come to know and worship God, respect and love their neighbour, and learn human and spiritual values, such as courage and patience, honesty and loyalty, industry, and love of God and neighbour.

Education is a life-long process, and succeeds best when constructed on the four pillars of the cardinal virtues: prudence, justice, fortitude and temperance.

Prudence (sound judgement) is at the base of the others, and guides them. Justice is manifested in one's sense of responsibility and concern for others. Without fortitude (steadfastness, patience and perseverance) one does not go forward. Temperance is essential for a person to master his sense appetites and use his time profitably.

These virtues may be learnt at home and at school. The two 'institutions' should work together in the task of educating the young.

Parents have the right to demand that in school their children are educated in accordance with their own moral and religious principles, including what is known as family life education, or sex education.

A person fares well when the right reason sustained by good will, direct all his powers. The mind must be prepared to receive the truth, rather than be filled with knowledge; this is the proper aim of education.¹

Education must prevent children growing up bourgeois, with an attitude of self-satisfaction, insensitive to lofty emotions and ideals, powerless to appreciate what is fine in character and conduct; streetwise, materialistic, calculating unprepared to take great risks, yet ready to compromise on principles.²

Subject by subject at school.

In today's school programmes there is an over-emphasis on subjects related with science and technology, and other fields that are seen to prepare children for a livelihood, rather than for life. These subjects deal with quantity and the quantitative relations of material things, yet life cannot be reduced to terms of quantity. A scientist concerns himself with what HAPPENS (phenomena) rather than with what IS (reality).

The humanities instead deal with Reality. For example, History is the story of human life; Literature analyses human life; Philosophy and Religion explain human life. Yet, CS Lewis was not far wrong in analyzing the present attitude towards history when he said that besides idle curiosity, History has no significant relation to moderns; as if only the present exists for them.

1 (Leen. What is Education?).

2 (*ibid.* adapted).

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Regarding Philosophy, Leen says that we take in more philosophy than we realize; for example, through grammar, logic, ethics and maths, even classical literature.

As for Religion, if religion, morals and ethics are to be simply subjects taught in isolation, whether examined or not, they are likely to be abandoned when children leave school. Instruction in faith should both keep pace with other disciplines, and should be a unifying principle in the syllabus to show that reality and knowledge have a common source and end.

II. BUILDING THE FUTURE ON THE PAST

1. EDUCATION AIMED AT VIRTUE

Education, whether the African tradition, or the Western tradition, dating back to Plato and Aristotle, has always aimed to train young people to be GOOD citizens. To this end, it has stressed: good character and morals, good manners and a good mind.

This can only be achieved through i) training and discipline, especially self-discipline, which is what education is about; and ii) schooling a person's tempers, feelings and impulses to obedience. For example, a "hot" temper can be trained to be rightly indignant at a wrongdoing, or to violently defy authority.

Aristotle wrote: "For the first five years a child's life should be given up to healthy play. Great care must be taken that children are not allowed to be too much with "servants", from whom they may imbibe 'low tastes', and that they are protected against any familiarity with indecency. The "servants", or baby-sitters, of our day are the television and video-games. His words still hold true.

In the Western tradition, reading, writing and speaking were important. In the African tradition, memorizing and speaking were important, in the absence of a writing culture; the older generations still have phenomenal memories for events, people and stories.

In both cultures, bodily culture was important too: to make the body tough and strong, and also develop moral qualities of grace and courage.

Artistic activities took an important place too. For Aristotle the arts, especially music, had a direct influence on character. Music, dance and acting were important in the African tradition, culturally and as character-building.

2. WHAT WENT WRONG?

With the democratization of education, classical education, with its emphasis on training the mind to think and analyse by exposure to the classic languages and the age-old works of literature, was viewed as elitist and incomprehensible to the masses. It was dropped, and inadequately replaced.

Modern education systems, by attempting to make education accessible to everyone, have settled for the ‘lowest common denominator’, making education not too hard, and “fun”. In the process today’s schools are failing to produce thinking citizens. Mortimer Adler said that without invention culture dies, and without tradition a culture cannot begin to live.

In ‘*Crisis in Contemporary Education*’, Mortimer adds that the imminent tragedy of the contemporary world is written in the fact that positivistic modern culture has magnified science and almost completely emancipated itself from wisdom. We have not, despite everything, progressed in moral wisdom. All the advances in science have not changed the moral and political problems that men face, except to make them more difficult, because men have more means at hand, dangerous means, to gain their end.

The intellect can only be cultivated when it is fed with knowledge and wisdom, and acquainted with truth. Hence, the value of the great classic works of literature and thought, and not only for students of the humanities, but for everyone. A person can only be trained as a chemist, lawyer or physician after he has been fundamentally educated, and has learned to read and write and has some ideas. Teachers too must be trained in the liberal arts, and not only in psychological skills. They must have a cultivated mind, to pass on, to effectively communicate, a cultivated tradition and to inculcate discipline.

Present-day education is wrongly focused. It fosters a cult of success and of beating one’s neighbour. Increasingly, the emphasis is on the student’s interest, making him a buyer and the teacher the salesman, instead of a doctor curing ignorance and incompetence. In many places students choose their own road to learning, following their immature interests.

Education that doesn’t build on wisdom or respect reason leads to frustration of the individual; when reason doesn’t rule, the mind yields to the weight of opinion propagated by pressure. (M Adler, *ibid*)

3. BACK TO THE CLASSICS?

The need to study the great thinkers and refer to them should be self-evident. Teachers should not fear what the great thinkers say, provided they themselves are competent and upright enough to transmit the truth to their students.

In her essay, 'The Lost Tools of Learning', Dorothy Sayers investigated the medieval system of education, showing how relevant it still is. From 9 to 11 years, children spent much time learning words and memorizing grammatical structure, preferably the ancient languages of Greek and Latin. This is the age to fill children with facts, numbers, dates, events, classifications, and anything that lends itself to easy repetition and mental assimilation

From 12 to 14 the child begins to understand what he has learned, and starts to use his reason to ask questions based on what he has gathered at the previous stage. He forms logical relationships by asking questions. At this age they can learn the formal rules of sound thinking; events of history also require careful reasoning to be understood. It is also a good age to study geometry, and questions for theological discussion.

The next stage, from 14 to 16 is when the child moves from grasping the logical sequence of an argument to learning how to present it in a well-reasoned and attractive manner. By 16 they should have acquired the tools of learning that are necessary to study any subject.

In modern education, we have put the cart before the horse, expecting the students to master many subjects before they have mastered the tools of learning. Though grammar, language and logic may seem dull, they are indispensable tools to be able to master any subject. Sayers ends her essay: "The sole true end of education is simply this; to teach men how to learn for themselves; and whatever instruction fails to do this is effort spent in vain." Learning to learn for oneself was the pedagogical goal of classical education.

Classical education also makes us face what is not our immediate experience. It forces us to look at life in all its complexity. It gives a student the opportunity to develop the depth of understanding and breadth of experience that are foundational to true wisdom, meant as an understanding of the world and its ways.

This is in contrast to the "realities of life" presented to us by the media, which would persuade us that the whole of life's meaning can be found in a sequence of coloured images flashed before us. This generation wants learning to come through fun. Aeschylus tells us we must "suffer into truth". Yet, we entertain our minds to

death and then find ourselves confused when our young people discover truth to be a superfluous nuisance impeding their pursuit of the “happy life.”

III. SCHOOL: BARRACKS OR HOME?

1. EDUCATION OF THE WILL

As we have seen, education should aim at developing the mind, and form the will and heart. It should enable the child’s personality to enfold with all its rich possibilities. The goal of an integral education is to help a student develop his character and grow in virtue. It is also learning how to make proper use of one’s freedom. It is what we are left with when we’ve forgotten what we read in the books.

At the same time, the educator must help the student evaluate his actions, explain the positive reasons behind obligations and prohibitions, and help him understand the positive objectives of the obligations. The teacher himself has to BE what he wants his students to become.

The teacher must never be afraid of allowing students their freedom, after teaching them by his words and actions what true freedom, that is responsible freedom, is. The truly free person will choose what is good.

Students need to be accepted, by their peers, their parents and their teachers. They respond better to trust placed in them than by having rules imposed on them. Trust means being given credit, considered capable of doing good and capable of truth; that is, capable of telling the truth and of keeping a confidence. To receive someone’s trust is to receive a great gift. Educators must show they can be trusted, keep their promises and respect confidences.

In the education of the will, we can differentiate between two types of education: Repressive and Preventive. The first, repressive is the military-style which we are familiar with in almost all our schools: strict hierarchy; discipline based mostly on fear; harsh punishments; little interaction at the various levels; absence of dialogue; group punishment; and external conformity. The second, preventive education is based on Reason, Religion and Loving-kindness (Don Bosco). This kind of education is the work of friendship. The teachers do not distance themselves from the students. They meet them half-way so they voluntarily come the other half. Nor do students of higher classes despise those below them. Inner persuasion can come about only through trust, and this facilitates the proper growth of the student. The student will develop his personality insofar as he internalizes and adopts freely what he receives. This is the

difference between educating and domesticating. True education takes place when norms of behaviour become one's own criteria and external attitudes are replaced by inner conviction and determination.

In education, however, parents play an essential role. The School-Home-Student triangle. The same values are taught and lived at home and at school. In the best of situations the school becomes a home away from home. Relations between school and parents should be of dialogue and open communication, and not confrontational.

2. THE IDEAL PRINCIPAL

Practically every principal of an African school is challenged to run a successful school, with few resources and average students. He/she is expected to make them do well academically and to produce all-rounders. But headteachers are never taught what a good head is like. The headteacher or principal should take into consideration that education is a calling, in which one is ready to sacrifice himself for the others. In the case of a school principal, the others are his teaching staff, the administrative staff and the support staff, the students and their parents. All must work together to make a school a success. The headteacher is the conductor waving the baton, whose every action can be seen by everyone. He/she should also be an "expert" in human nature, which requires him to be well read, with a wide range of interests and conversation topics.

Whether a school adopts the preventive system of education or not, in which the students' wills are properly formed will depend on the principal. If he does not fear to take the risk of allowing himself to be approached by staff and students, and to be fully involved in the life of the school, and continually at the service of the school community, it can work.

If leadership is service, such a school head will give the right example of what true leadership is. Leadership derives from serene self-mastery, and means to be quietly in control of any situation, and at ease with all kinds of people.

IV. ARUA, WEST NILE

1. THIRTY YEARS AFTER IDI AMIN

On 10 April 1979, with a counter-attack of the Tanzanian forces and all the forces opposed to Amin (twenty-six different groups), under the name of the UNLF (Ugandan National Liberation Front) entered Kampala. Owing to infighting in the UNLF, Yusuf Lule was deposed as president after 68 days. Godfrey Binaisa took

over power in June 1979. During 1980 the Tanzanian forces occupied much of Uganda, including the West Nile region, and supported Binaisa, although they were gradually leaving for home. Former President Milton Obote returned in May that year. In December 1980 general elections were held, and the results were hotly disputed because of gross irregularities.

Early 1981, violence broke out in the region. Besides the official army, there were two counter-forces: Museveni and soldiers of what would become the National Resistance Movement, and troops loyal to Idi Amin. In mid-1981 Tanzanian troops, which, according to some observers, had had a tempering influence, withdrew, and Ugandan army soldiers in the north-west plundered Arua, partly to wreak revenge, partly because they had not been paid and were hungry.

An estimated 60% of the population fled mainly to Sudan. This state of disruption continued until 1985. Museveni and his troops occupied Kampala in January, 1986. Two months later Museveni visited Arua, and the local elders had persuaded the youth to lay down their weapons. Meanwhile the region had been devastated: schools, clinics and private homes damaged or destroyed, and livestock eaten. Over twenty years later, the effects are still felt.

Joachim Ozimati,³ former secondary Chemistry teacher and currently lecturer in the National Teacher College, and Co-ordinator of the Teacher Resource Centre in Arua, says that from 1980 to 1982, the educational system virtually collapsed, and tertiary level students fled to Zaire or Sudan in the hope of continuing studies there. Southern Sudan was enjoying a period of peace at the time. Afterwards, children joined primary one at the age of ten years. Meanwhile, schools had lost equipment; text-books and desks had been used to light fires.

Teachers from the region moved south to central region, where the best schools are, and remained there.

From the early 1990s, owing to war and depressed circumstances in the north, economic disparity had taken hold. Teachers in the north received little pay and morale was low.

As families started moving back, survival was priority. They had to rebuild their homes and start growing crops again. There was little money for school fees; children went to work. With quarry work on construction sites and the tobacco plantations, young people became economically empowered and independent of

3 Ozimati Joachim, oral interview by the author.

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their parents. Many parents lack regular income and rely on their little farm produce and petty trade. In Arua petty trade and smuggling flourish, as the town is close to the borders with two poorer countries, Sudan and DR Congo. Thus, young people reason: Why go to school?

In 1997, the Ugandan government imposed a ban on teacher recruitment, except for subjects like English, Science and vocational subjects. Many qualified teachers were unable to find employment in government schools, and some opened up their own private institutions. Since then, private schools in the region have outnumbered public ones. They charge lower fees, and are ready to accept children with poor grades. Government schools attempt to maintain certain standards, and have to charge for ‘extras’, and to supplement their low government grants.

Modern life has affected the quality of education in schools, boarding and day. During holiday time, children get used to attending discos, dances, watching videos and European soccer, since their parents are out until late doing petty trade to support the family. Children want to continue these “pastimes” during term-time, and escape from home or boarding school to do so. When girls become pregnant, the fathers of the child abandon them, and compensation is no longer paid since few families now own cattle, most having been destroyed, or shipped out of the region.

Interview with Fr Primus Asega, Parish Priest of Christ the King Parish, Arua Town, says that with years of unrest in the region, the quality of education deteriorated badly. Many young people lost interest, and joined the army or did business, since they would make more money than educated people.

After President Amin was ousted, people were on the run and could not study, and many grew up without ever going to school. Young people joined secondary between the ages of 18 and 25 education stopped being a priority with the government; security concerns took over.

With the introduction of UPE (Universal Primary Education) and USE (Universal Secondary Education), standards have dropped. (USE started two years ago; UPE began much earlier). Too many schools and universities have sprung up. Fifteen or twenty years ago, by the time of leaving Primary school, a student could speak English well; no longer. Children would read the classics; now it is simplified reading directed towards passing exams.

David Angusa, Deputy Headmaster of Mvara Secondary School, Near Arua, Asserts that war has been part of the growth of teachers and students; some of the current teachers were born in the camps.

Traditionally disputes were solved by frank and open discussion in the presence of elders. This has almost disappeared. Conflicts between tribes and clans are settled violently.

In 1981, when Angusa was 13 years old, he witnessed a rebel killed in his house; he saw houses burnt and people killed. Beatings and torture were part of their daily lives. The school infrastructure was badly damaged by the war. Many schools became barracks, and books and furniture used as firewood.

Generally students are not motivated, and the general academic performance is low. Students refuse dialogue and resort immediately to violence. Classroom issues and domestic issues are all solved this way. Angusa adds that in recent incidents in two nearby mission-run schools for boys the headmaster was beaten up and taken by the students to the police station. Students burned the library and some staff houses. In the other school students frog-marched the headmaster through the streets to the police station.

Parents now have to pay full boarding fees, and students have become difficult to handle. Many teachers prefer to live outside the school compound, and go without the extra pay for supervising boarding, rather than risk their lives. The explosion of private schools with low fees, poor academic and disciplinary standards has created problems in the area. These schools are mainly boarding and have no accommodation for teachers. Female students go out at night with no control; boys and girls go to trading centres to drink alcohol. The local authorities are able to make by-laws, but do not. Drug abuse, especially miraa, has become deep concern. Meanwhile, government schools operate on very stringent budgets.

V. LIRA, NORTHERN UGANDA

The epi-centre of the LRA rebellion and where the effects were worse felt was Gulu, the capital of Acholiland, where Joseph Kony wanted to leave a very clear, brutal message to his own people. Lira, to the east, the home of the Lango people, was spared, relatively. Whereas Gulu and the outlying areas were battered by the rebels without respite for twenty years, Lira was the object of more sporadic attacks, and business and agricultural work could proceed. Two of the most famous events of the LRA war occurred in this area: the abduction of 130 girls from Aboke Girls School, in October, 1998, and the massacre at Barlonyo Camp, not far from Lira town, in February, 2004 when a large number of camp-dwellers and

UPDF (government) soldiers were massacred. Official figures state about 120 deaths; the unofficial estimates of the local people give 300 as the figure of dead.

Most camps have closed and school life resumed. However, infrastructure is inadequate and poverty still rampant. For example at a school in Ogur, 330 pupils dropped in 6 months, since the children were needed to bring in the harvest, the first harvest since the camps closed. There were no basic educational materials. Teachers have to travel in every day from Lira, including the headmaster.

David Adinga is a senior teacher, who taught in the temporary schools in the displacement camps, such as Ojwina, a learning centre in the camp, which took children from three camps within the town, which in total catered for 8,000 people. Day students came from the camps; the teachers lived outside and were refugees from areas to the north of Lira, Kitgum, Pader and Moroto.

At Ojwina, there were insufficient learning materials and furniture. Many of the pupils were traumatized and could not follow simple instructions. They would fight readily; they 'wanted to kill.' The more traumatized children would steal or vandalise food that women brought to sell. Class control was difficult. Children fell asleep. Some were abused by their parents, and were rebellious to teachers. They would not do homework, or were unable because of the cramped living conditions.

The attitude of some parents was averse or indifferent to learning, because tomorrow they will be killed. Some teachers too, had no motivation and did not want to teach. Many of them had fled from the north (the gateway for the rebels entering Lira from Gulu), with no belongings.

In Lira, every family has been affected: someone has been killed or abducted or mutilated, or seen others killed or abducted or mutilated. Furthermore, the Langi do not understand why Kony should involve them in his war.

Education is going ahead. The spirit of the teachers at the two schools visited was admirable; ready for sacrifice to bring up a generation of children whose education has been neglected.

VI. GULU: TWENTY YEARS OF TRAUMA

Even more than Lira, the present is too close to events to allow us evaluate the long-term damage that the LRA rebellion has had on the local people, and on education in particular. It would be no exaggeration to say that every family in Gulu District has come face to face with the terrors of a brutal war. Families have had children abducted, some several times. Some have returned and have been

hardly scarred by the experience. Others have returned with varying degrees of trauma. Some have not returned; either they have been killed, or escaped and wander around half-crazed, or have remained with the rebels. Some have been disfigured by amputation or mutilation of lips, ears or nose.

At the height of the insurgency almost two million people were in squalid, congested IDP camps, living on food donations and in conditions of promiscuity. At night shop verandahs in Gulu town accommodated thousands of children, who huddled together for safety. In the past year many have returned to their homes and the children need no longer sleep in the open. However, other families fear to leave the camps because their homes are in remote areas, or they might stumble upon an unexploded landmine, or they want to avoid land quarrels and remain in the relative safety of the camps. By now an estimated 60,000 still live in the settlements; or in satellites, closer to urban areas where conditions are more secure.

This war has been unusual because of the nature of the brutalities and killings, which contravene any reasonable or accepted social norms. For example, an abducted child would be forced, on fear of death, to raid a neighbour's house and kill everyone inside. Children would be forced to kill their friends or family members, or be killed themselves. This makes the whole process of healing and reconciliation more complicated.

It is now unlikely that the LRA will invade this area again. International pressure is being applied, albeit slowly, on the Ugandan government to bring an end to the war, and capture the rebel leaders. This adds a further complication since UPDF soldiers have also attacked local people instead of protecting them, accusing them of collaborating with the rebels; there have been allegations of torture. Local religious and community leaders opt for a peaceful end to the war, and to negotiate with the rebel leader, Kony. With so many players involved, resumption of rebel attacks seems more remote.

However, the damage done to infrastructure, but much more to the human psyche, is incalculable. Yet, the atmosphere in Gulu town is dynamic. Business is booming; people go about their work and occupations. Schools are running. Buildings are being put up, both commercial and private. The town is a NGO capital but, as they are not accountable to the government financially, there is certain official bias against them.

Nevertheless, the Acholi people have shown a truly admirable resilience, and are trying their best to get on with life again.

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Norbert Olaa, Principal of Sir Samuel Baker School, the first government boys' high school in northern Uganda, built in 1952, says that resources and personnel have been mismanaged. The biggest impact of the war on learning has been the way the north has been unable to cope with planning that keeps pace with the rest of the country. The government has been assuming that every region is at the same level; the north is far behind, but this has not been taken into account. When differences arise, emergencies cannot be dealt with.

In 1996, when UPE (Universal Primary Education) was introduced, to be fully operational no later than 2001/2, it was thought that a newly expanded Primary and an unexpanded Secondary could go ahead in parallel. This was all right for the rest of the country, but in the north, primary and secondary were equally needy. Many Primary schools were in better physical condition than Secondary, in which many students were sitting on papyrus mats. In 1980 every sub-county was allowed a secondary school; in the north several of these have still not returned to their sites.

In April, 1992 a government White Paper rendered the establishment of boarding schools more difficult, except for special groups such as the disabled, and people from Karamoja, but NOT from the war-torn north: Gulu, Kitum, Amuru, Pader and Lira. From that time, parents had to pay themselves. (Ref Amendment 144 of the White Paper, "*Education for National Integration and Development*").

Gulu's streets are filled with young men, many of them boda-boda drivers and small traders, who have dropped out of school. Most of them want to complete their education.

Faith-based groups and NGOs are making attempts to cope with the many people affected by terrifying experiences, especially those who have returned from the bush, and others who have had tragic experiences within the displacement camps. Studies are being carried out on the application of *mato oput*, the traditional form of re-establishing relations suspended between two clans, as a response to either a premeditated or accidental killing.

There is an interesting recent example of the application of the traditional ceremony of *gomo tong*, the bending of spears. This was used in the past to mark the end of a war between different Acholi clans, or between Acholi and their neighbours. In 1984 the ceremony was performed between the Acholi and their Madi neighbours to stop the violence between the two groups that reached a peak after the fall of Idi Amin.

VII. RWANDA

1. WHAT VISION CAN DO

Events surrounding the 1994 genocide have been widely documented by both academics and media correspondents. The one hundred days of killings left the country and most of its institutions destroyed. Further killings in certain areas of the country during the next two or three years also affected learning adversely. The effects are still to be seen: many unemployed young men in the urban areas, and young people born during those years, or of early school age at that time, who have never completed their education. Nevertheless, the present regime is making huge steps forward to educate its population, and Rwanda has been spared and is being spared much of the class disruption and disciplinary problems that parts of Uganda, and Kenya, have experienced.

This may be due to two reasons: the strong leadership in the country, in all sectors of civil society that fosters a culture of discipline, hard work and low levels of corruption; and the natural ethos, or nature of the Rwandans.

Everything in today's Rwanda must be understood in the light of the genocide and aftermath which more than decimated the population; the role of the Catholic Church, especially in education, and the fact that Rwanda was part of Francophone Africa, although the present regime favours contacts more with the English-speaking world.

Before 1979, there were six years of primary school, six years of secondary and five of university studies. Between 1979 and 1994, the system changed to eight years of primary, six years of secondary and five years of university. Since 1994 there have been six years of primary, six years of secondary and four years of university. Students start primary learning at the age of seven. Almost all schools were run by the Church in the past.

According to the National Secretariat for Catholic Teaching (SNEC) 2007 yearbook, the Church is now in charge of 52% of all primary schools in the country, and 21% of all secondary schools, both diocesan and those run by religious orders. In Kigali 70% of the primary schools belong to the Archdiocese.

The government pays teachers, provides books and renews buildings with the assistance of World Bank funds, including diocesan schools.

2. TEACHERS

Many trained teachers died in the war or fled the country. Others were imprisoned, to await trial for being suspected of being implicated in the murders. Many Congolese came to fill in empty teaching posts. Of the Rwandans who graduate from university, few choose teaching as a career, owing mainly to the low pay: jobs in government or in NGOs pay better.

As elsewhere, teaching was a profession to take pride in before the war, but has lost prestige since. As elsewhere too, the opinion of older education professionals is that the present university graduates are below the quality of the ones before the war.

In theory, head-teachers and subject teachers have an annual three-week in-service training. In practice this takes place as and when the need arises. Government officials also meet with parents, school heads and student representatives from time to time. President Kagame calls annual meetings of student representatives of all schools in the country, at both primary and secondary level, and asks students to tell him their problems directly. Teachers who misbehave, or who are involved in acts of drunkenness, sexual harassment, etc are dismissed. As there is little corruption this is effectively enforced.

3. TEACHING ENVIRONMENT AND CURRICULUM

The educational authorities have been strict on discipline since the war. Strikes are unheard of. Students are not allowed to segregate themselves into “ethnic groups”. Rwandan children tend to be obedient, reserved and serious. Rwandan children are taught from young that it is disrespectful to challenge authority. Many diocesan schools run youth leadership movements.

Many parents still want schools that excel in discipline, good morals and academic excellence. The Church-run schools have maintained this tradition.

The emphasis is now on technology, sciences and business subjects. The present regime plans to make Kigali an Information Technology and service industries hub for the region.

The medium of instruction is currently mainly French, though in October 2008 the national parliament approved the use of English as the medium of instruction at all levels.

Adult education is being strongly promoted. Many people left school having completed only primary education; some did not reach that far. Some completed

secondary, but did not go to university. Evening classes at many levels are provided.

4. A NEW START

Rwanda is a special case, not only because of the war. Other areas have experienced conflict. But in the way it has pro-actively captured the opportunity to start anew, and attempt to rebuild a better society.

This has been due, and is still due, to strong national leadership; an organized and disciplined society –shown also in the cleanliness of public places and orderliness of its transport system–; a strong sense of national pride and culture – with little inferiority complex when faced with “modern values”; a low level of tolerance of corruption, and what appears to be a genuine effort at national reconciliation.

All this infiltrates into the education arena. People want to be well-educated, to complete their learning if it was interrupted. According to Stephen Kinzer’s recent book *A Thousand Hills*, based on a series of interviews with President Kagame, Rwandans like to think of themselves as ‘serious and correct’, in their approach to work, to their civic duties and to their sense of hospitality.

Rwanda leads the way in many areas of education, particularly the stability and lack of conflict within the schools, its organized education system, especially in the Church-run sector.

VIII. CONCLUSION

A situation of conflict does not necessarily mean that a country has to take many years to recover and return to normality, as is evident in the case of Rwanda. Strong national leadership, vision and sense of purpose, conviction of the value of education, and a collective effort to achieve these aims seem to be very present in Rwanda, but less so in Uganda.

The Uganda case shows lack of imaginative and realistic planning. For example, a special policy and programme was needed for the North of the country which was a war-torn area, or an area recovering from massive emigration and loss of faith in both government and education.

Policies of banning the recruitment of teachers and putting the financial burden of supporting boarding schools on parents in a conflict zone were ill-advised at best.

To allow errant teachers, and school principals, and private boarding schools that are like something out of Charles Dickens' "Nicholas Nickleby" to continue operating with impunity, from reasons of corruption, harms the students and the whole education process. This point was repeated and emphasized time and again.

Fortunately northern Uganda, despite everything, still has many excellent and dedicated teachers and school administrators who are truly concerned for their students and the students' families.

What was of special interest was that in Arua, Gulu and Lira the solutions proposed were the same: to engage the stakeholders much more. All mentioned the following stakeholders: the school itself; the family, and much more parent-teacher and parent-school contact and dialogue; the faith-based institutions, which really are already involved; the civic authorities, especially local councillors who do not ban activities that cause harm to students, such as night clubs, discos, video parlours that show unsuitable movies. Yet, it is within their power to do so. Particular attention was directed to the media which, educationists felt, stoke the flames in order to get a story, and instinctively take sides against any authority, such as a well-run school, which is trying to do a good job.

Invariably educationists spoke of the importance of parent's involvement and of the role of religious practice, of teaching religion and ethics in school. In both countries the trend is towards a more secularized education, which they do not welcome.

Teachers are already trying to involve parents in the running of the school, creating opportunities of dialogue with students and student representatives, or activities that deal with peace and conflict resolution. Some schools already hold meetings for parents that discuss family life and family relations, although this idea is still very new.

However, it is still unfamiliar to trust students, minimizing rules and leaving students free to make the right decisions; and closer interaction between teachers and students, with a view to prepare self-disciplined, properly motivated and mature leaders within the school environment today, and in social life and the world of work tomorrow. Experienced and dedicated educationists understand the value of this approach, but hesitate to take the risk, or feel that the present system does not allow it, or would not countenance it. If education as we know it is to go ahead and improve, this is the challenge the education authorities and school principals will have no choice but to face in this world that is becoming more globalised and whose institutions are becoming more democratic.

ADDRESSING HUMAN AND SOCIAL DEVELOPMENT: THE EXPERIENCE OF STRATHMORE UNIVERSITY

Carlos Sotz

I. INTRODUCTION

Presidential elections in Kenya have always been mired by ethnic confrontation, culminating in the December 2007 presidential elections which were followed by unprecedented levels of violence and destruction. The fracas of January-February 2008 did not feature university students making the usual violent demands: this time confrontations were far more widespread, destructive and deadly. The consensus is that there is something wrong in Kenyan society, but what is it? On the surface it looks like an outburst of frustration from those who perceived themselves as lacking opportunities to move ahead in life, fuelled by those who seek political power, compounded with geographical location and ethnicity. They all expose deep divisions within the fabric of society. Is there anything universities could have done to prevent or repair these cracks? Should they do something to pre-empt them in future? Above all, do universities have any role to play in this?

(a) The politics of higher education

Higher education has always played a significant role in Kenya politics because of its human and social development potential. After independence it became the way of training the much needed manpower to run the country and man the professions. Coupled with the lofty task of nation-building it also became the accepted way of upward social mobility. In the late 1980s and early 1990s, when economic growth was sluggish and cost-sharing was introduced, expanding university education became a way of trading political support. When that avenue also got exhausted, private universities were encouraged to provide an avenue to the increasing number of secondary school leavers. The expansion of public universities paid a high price from the governance and financial points of view which resulted in a deterioration of quality. In the mid-90s the reaction to accommodate market demands as a means of staying in business. From an institutional point of view the worst seems to be over for the local universities, but it is pertinent to ask ourselves whether they are meeting society's expectations.

Kenyan universities, both public and private, are torn between initiating change and responding to it, between serving the public interest and competing for survival, between facilitating access and upholding standards: in summary, between quantity and quality. Since the 1990s they had to overcome incredible odds to remain operational. While competition is forcing universities to modernise, still

many of them lack a strategy and have not defined how to answer the needs of society. Universities cannot limit themselves to certifying that elite made up of those who qualify on academic merit, regardless of their financial status (otherwise known as government-sponsored students), and those who qualify on financial merit, regardless of their academic qualifications (otherwise known as self-sponsored students). Kenyan universities in the 21st century should recognise that paradigms have shifted and take a leading role in the human and social development of their stakeholders, which means becoming efficient and modern organisations, leaders in corporate governance.

The introduction of the parallel programme, (otherwise known as ‘module two’ since it is offered in addition to the regular program or module one’) had a positive impact on public universities from the point of view of revenue, innovation and entrepreneurship. It also impacted on society because it improved access to higher education. But it is generally accepted that *module two* had a negative impact on the quality of education. It is also possible that disaggregating academic merit from the ability to pay fees may have done a disservice to equity. On the positive side *module two* increased efficiency in certain areas of university education: it provided a way of avoiding the 16-month time-lag between finishing the Kenya Certificate of Secondary Education and joining campus and shortened the average length of undergraduate programmes; the income of academic staff has improved and some facilities are now better looked after.

However, the expansion of public universities had an adverse effect on quality, making private universities more attractive. There was also a trade-off between quality and sustainability which eventually led universities into open competition: in the span of a few years they have started operations in all major urban centres of Kenya to expand their market share and maximise the return on their human and physical resources. Competition has achieved in a few years what no government could have financed on its own: the access to university education of many more thousands of students and the financial stability of these institutions. It could be argued that quality was replaced with quantity. Certainly this is a departure from the previous model focused on quality education only for those who, qualifying on merit, could be absorbed by the economy. It is also a fact that market influence on higher education has shaped a new awareness in society. In the light of the recent political violence we could ask ourselves: are universities meeting stakeholders’ expectations? Are universities serving society? In the light of the post-election violence, what should they do?

(b) The case of Strathmore University

A university can serve human and social needs in many ways. This paper will try to address one question: what is Strathmore University (SU) doing to serve society and hopefully foster peace? By serving society we mean serving the common good

or the public interest. This same question could be framed in wider terms: what could universities in the region do to balance the tension between financial demands and fostering justice in society? Is there a sustainable model balancing growth and equity? Can that model be aligned with government policy, market demands and society's needs? Above all, do terms of service and working conditions allow academic staff to discharge their role? The reality on the ground is that productivity of academic staff is low and a new work-culture is required, which SU is trying to introduce.

(c) Access

University education is vastly different today, both in Kenya and in the rest of the world. More attention to social justice means that universities try much harder to increase access. Exponential increase of knowledge requires a proportional increase in university resources, staff development and partnerships to remain relevant and meet societal needs.¹ However, the development of university education in Kenya in the last twenty years has largely followed a privatisation trend, and the human and social development that society expects is assumed rather than pursued in a strategic way. To address the issue of access Strathmore University negotiated a loan scheme for students with two stages of implementation: the first one started in July 2008 and provides short term loans repayable within twelve months; the second stage starting in 2010 will provide long term loans repayable after completion of the academic programme. It is too early to assess its performance, but progress so far is positive. The main obstacle that has been identified up to now is a cultural mistrust in bank-loans.

(d) Aligning Strategy and Resources

The universities' chronic shortage of means is usually an excuse to focus on certification (churning out students) and disregard everything else: very often these amounts to short-changing society. We want to challenge this approach: embedding a human and social development agenda in a university is a target that depends on priorities rather than on the amount of money left over from other more important issues. SU designed a strategy, aligned its resources to achieve it and is developing performance indicators as shown in the table below. Needless to say, financial discipline is always a challenge and a very important component of SU work-culture.

1 Brenda Gourley, *The Role of University is to offer intellectual leadership through, 'The Independent'* of 3 June 2008, page 42.

Strategy items with human and/or social development impact	% of SU revenue	Performance indicators
Staff bursaries and training	2.2	Completion of programmes and bonding period
Staff conferences and seminars	1.5	Number of papers presented and published
Scholarships for students	1.1	Number of students and performance
Repairs and maintenance	1.0	Time to implement repairs
Staff development provisions	0.5	Implementation of HR strategic plan
Research provisions	1.0	Yearly audited accounts
Research activities	1.7	Research output
Library	10.0	Relevance of material
Provision for capital investments	1.0	Implementation of Mgt Board strategic plan
Community Outreach Programme	0.3	Development audit of partner institutions
Advancement and External Relations	0.9	Cover its own overheads
Staff medical self-insurance scheme	1.56	Increase efficiency by building a dispensary
Full-time staff	37.5	Productivity and turn-over
Part-time staff	8.0	Productivity and turn-over
Sports, clubs and societies	1.61	50% student participation
Mentoring	Part of staff duties	Two mentoring meetings per student per semester
Placement and Attachment Office	0.36	Number of students placed per year

(e) The ethnic factor**(i) *From a history of education perspective***

It is generally accepted that ethnic inequalities in education in Kenya have their roots in her colonial past and in the administrative organisation of the country. Alwy and Schech's (2004) analysis of the Gross Enrolment Ratios, the number of schools and the number of qualified teachers conclude that some ethnic groups got better resources and opportunities due to their geographical location and proximity to the ruling elite. Over the years these factors allowed them to accumulate an advantage over the rest of the population in terms of educational infrastructure and resources² with a direct bearing over their social development.³

(ii) *From a social perspective*

Miguel and Gugerty argue that "ethnically diverse societies have slower economic growth and are more prone to corruption and political instability than ethnically homogenous societies, as a result of political conflict and lack of cooperation across ethnic groups."⁴ In some districts of Western Kenya populated by Luhyas, Tesos and Luos, they examined two indicators: water wells mostly constructed between 1982 and 1991 by Kenya-Finland Development Cooperation, and public primary schools.

"We find that local ethnic diversity is associated with sharply lower school funding and lower quality school facilities in 84 primary schools. This effect operates through lower contributions at public fundraising events. The drop in schools' funding associated with the change from complete ethnic homogeneity to average school ethnic diversity is approximately 20 percent of mean local school funding per pupil, and this relationship is robust to socioeconomic, geographic, and demographic controls.

There is additional evidence that these collective action problems may extend beyond the school setting. Data from 667 community water wells in rural western Kenya indicates that local ethnic diversity may also be associated with poor well maintenance: areas with average levels of ethnic diversity are 6 percentage points less likely to have a functioning water well than homogenous areas. While the well results are not definitive on their own, and are not as robust as the primary schools results, this evidence does

2 Alwiya Alwy and Suzanne Schech, 'Ethnic Inequalities in Education in Kenya', *International Education Journal*, 5, number 2, (2004), page 2.

3 The adoption of Swahili and English as official languages certainly puts at a disadvantage certain communities, particularly in the rural areas.

4 Edward Miguel and Mary Kay Gugerty, 'Ethnic Diversity, Social Sanctions, and Public Goods in Kenya', *Journal of Public Economics*, 2005, Volume 89, Issues 11-12, December 2005, Pages 2325-2368.

suggest that ethnic diversity has implications for collective action beyond school funding.”⁵

Miguel and Gugerty’s paper makes three contributions: It shows/discuss attention to the inability of ethnically diverse communities to sanction ‘free-riders’, it establishes an empirical link between ethnic diversity and low provision of public goods, and highlights the inherent difficulties in the decentralised provision of public goods.⁶ These findings are in stark contrast with the positive multi-racial experience of Strathmore since 1961. Due to our lack of scientific evidence we tried to support this experience on relevant scientific literature.

(iii) Five ethnic myths debunked

Contrary to Miguel and Gugerty’s findings, the Human Development Report 2004 (UNDP) states that “policies recognising cultural identities and encouraging diversity to flourish do not result in fragmentation, conflict, weak development or authoritarian rule. Such policies are both viable, and necessary, for it is often the suppression of culturally identified groups that leads to tensions”.⁷

The report debunks the following myths:

1. “People’s ethnic identities compete with their attachment to the state, so there is a trade-off between recognising diversity and unifying the state.
2. Ethnic groups are prone to violent conflict with each other in clashes of values, so there is a trade-off between respecting diversity and sustaining peace.
3. Cultural liberty requires defending traditional practices, so there could be a trade-off between recognising cultural diversity and other human development priorities such as progress in development, democracy and human rights.
4. Ethnically diverse countries are less able to develop, so there is a trade-off between respecting diversity and promoting development.
5. Some cultures are more likely to make developmental progress than others, and some cultures have inherent democratic values while others do not, so there is a trade-off between accommodating certain cultures and promoting development and democracy.”⁸

5 Edward Miguel and Mary Kay Gugerty, Volume 89, issue 11-12, (page 2).

6 Edward Miguel and Mary Kay Gugerty, Volume 89, issue 11-12, (page 4).

7 Human Development Report (2004), Cultural Liberty in today’s diverse world, UNDP, page 2.

8 Human Development Report (2004), pages 2-4.

A further point:

“Human development requires more than health, education, a decent standard of living and political freedom. People’s cultural identities must be recognised and accommodated by the state, and people must be free to express these identities without being discriminated against in other aspects of their lives. In short: cultural liberty is a human right and an important aspect of human development –and thus worthy of state action and attention.”⁹

If universities have a responsibility in human and social development, they should provide society with intellectual leadership and place on the agenda without any fear the most difficult and intractable problems.¹⁰ Their role is to find and disseminate knowledge, particularly that which is relevant to society.

(f) Human and Social Development

The UNDP Human Development Report 2004 reminds us that ‘the vulnerable are easy to ignore’.¹¹ Normally they are ignorant and poor, and even when they are large in numbers they do not know how to get to be heard. ‘Part of the reason lies in the realities of majority politics’¹² but our concern is about the role universities could play to alleviate this situation. The UNDP HDR speaks of three myths surrounding cultural liberty and development which are relevant to our analysis:

Myth 1: Some cultures are more likely to make development progress than others¹³

Although there is no clear relationship between culture and development, the perception that the culture of a community matters for its development has a powerful appeal, even on educated people. In Nairobi it is easy to hear jokes and derogatory comments on the features of some communities, as if all of them had the same opportunities.

9 Human Development Report, (2004), page 6.

10 Brenda Gourley, page 42.

11 Human Development Report (2004), page 38.

12 Human Development Report (2004), page 38.

13 Human Development Report (2004), page 38.

Myth 2: Cultural diversity inevitably leads to clashes over values¹⁴

The UNDP HDR 2004 argues that ‘there is little evidence to justify this claim’¹⁵ although ethnic conflicts in the world since the 1950s have been carefully recorded and studied. There are other important economic and political factors such as greed and inequality which very often are not taken into account.¹⁶

Myth 3: Cultural diversity is an obstacle to development¹⁷

Once again, ‘there is no clear relationship, good or bad, between diversity and development’,¹⁸ but between leaders and abuse of power for personal aims rather than the common good.

In Kenya, for example, President Daniel arap Moi took over from Jomo Kenyatta in 1978. By 1988 the share of road building in the “home regions” of the Kenyatta coalition was a third of what it had been at the end of the Kenyatta years, while road building in the Moi home regions almost doubled. The picture was similar for health spending in 1988, which was 18% in the regions of the Kenyatta coalition and 49% in the regions of the Moi coalition.”¹⁹

This trend to abuse power for personal or sectarian aims can also be traced to the disparity in public spending on education to poorest and richest households in selected countries. In the table below “the pro-rich bias of expenditure on secondary and, particularly, tertiary education counterbalanced the generally pro-poor expenditure on primary education. In Sub-Saharan Africa and in the transition country group there was no pro-poor bias even in primary education”.²⁰

14 Human Development Report (2004), page 40.

15 Human Development Report(2004), page 40.

16 Human Development Report , (2004) page 41.

17 Human Development Report , page 42.

18 Human Development Report, page 42.

19 Human Development Report, page 43.

20 EFA Global Monitoring Report 2008, page 149. UNESCO, (Oxford University Press).

	All Education		Primary		Secondary		Tertiary	
	Poorest 20%	Richest 20%	Poorest 20%	Richest 20%	Poorest 20%	Richest 20%	Poorest 20%	Richest 20%
Sub-Sahara Africa (10 countries)	12.8	32.7	17.8	18.4	7.4	38.7	5.2	54.4
Asia and Pacific (4 countries)	12.4	34.8	20.3	16.9	8.3	37.3	2.5	69.0
Middle East and North Africa (2 countries)	15.3	24.1	24.7	12.4	11.0	24.4	4.0	46.9
Transition countries (7 countries)	15.3	24.0	19.3	20.0	12.5	24.6	8.7	32.6

Source: Davoodi *et al* (2003), Table 2 ²¹

(i) *Education as a financial investment*

Since fees for a university programme are normally a family affair in poorer households, how well equipped are Kenyan families to discern and evaluate universities' offers? Considering that most local universities offer a Bachelor in Commerce or equivalent degree, on what basis is the choice made to enrol in a

21 Davoodi H R, Tiongson E and Asawanuchit SS, 2003. 'How Useful are Benefit Incidence Analyses of Public Education and Health Spending', EFA Global Monitoring Report 2008 (Washington, DC: International Monetary Fund [Working Paper, 03/227]).

certain university? Judging by the lack of comparable information in the public domain, it is obvious that candidates do not choose a university because of the quality of the faculty, the research they conduct or their publications. It is more likely that the choice is based on reasons that affect them and their families more directly such as fees, time required to complete the programme and likelihood of getting a job upon completion. The decision has little to do with academic concerns but with expected financial returns. Since the demand for *BCom* places is still strong, universities do not need to invest in quality; they are satisfied with filling classrooms on a first come first serve basis. Essentially this means that universities are not selecting talent but the ability to pay, and this is proved by the existence of the so called *bridging courses*, which are designed to facilitate access to those candidates who do not fulfil the academic requirements but have the ability to pay fees. Individuals, society and universities make choices based on economic considerations but, to address human and social development, the latter may have to depart from narrow notions of efficiency, productivity and competitiveness to invest on long-term intangible returns.

(ii) *The social responsibility of universities*

Which are the long-term intangible returns universities should seek? A few months ago, in the yearly conference of vice-chancellors of the UK, one of them argued that it was not the task of universities to address the social ills of British society but rather to recruit talent and develop it. If talented students required financial support, universities should do their best to provide it, but for the sake of their teaching function rather than their social responsibility.²² It is not easy to define the social responsibility of universities, but it is undeniable that official policy and stakeholders in Kenya view them as agents of change and development.²³ Now that their survival needs seem to have been satisfied, universities should focus on their responsibilities. If universities had to report to stakeholders on human and social development according to the Global Reporting Initiative G3 guidelines for example, they would have to focus on the impact they have on the communities in which they operate, and disclose “how the risks that may arise from interactions with other social institutions are managed and mediated”.²⁴ Specifically, universities would have to report on the risks associated with corruption and compliance; their

22 Social Responsibility of Universities – Application of Corporate Social Responsibility Concepts on Public Universities, *The Times*, 9 September 2008, page A19.

23 Republic of Kenya, Ministry of Education, *The National Strategy for University Education 2007–15, Investing In The Future of University Education Report* (Nairobi: Ministry of Education, 2008) pages 19–21.

24 Global Reporting Initiative, (2000–2006 GRI) *Sustainability Reporting Guidelines*, Version 3.0, page 33.

strategic goals and performance; procedures related to training and raising awareness in relation to society's needs; procedures related to monitoring, preventive and corrective actions; and any additional contextual information which may help stakeholders understand how the institution is serving them: key successes and shortcomings, major risks and opportunities, key strategies and procedures for implementing strategies or achieving goals. Kenyan society would greatly benefit from this kind of reporting. Lack of information is a serious drawback on the good work that many universities do. For example, SU and its partners sponsor nearly 100 students per year in various courses, but so little is known about it that the public perception is that it is a quality but high-cost institution, inaccessible to most.

Universities' social responsibilities are not only a matter of funding but also of educating students to be able to tackle the ills of society. SU Faculty of Information Technology Curriculum Committee carried out a survey early this year among ten public and private local universities.²⁵ A quick comparison of the units on offer which may develop students' skills beyond what is strictly marketable shows the following results:

25 I am very grateful to Dr J Sevilla and Dr F Acosta for having alerted me about this information.

Name of Unit or equivalent field of study	Number of Universities offering it
Introduction to Ethics	3/10
Ethics I	2/10
Ethics II	1/10
Development Studies	5/10
Community Based Attachment	1/10
Political and Social Philosophy	2/10
Business Ethics	5/10
Research Methodology	4/10
Project Management	4/10
Industrial Attachment	8/10
Business Law	2/10
Principles of Marketing	3/10
Social Impact of Information and Communication Technologies	5/10
Information Systems Security and Design	3/10
Entrepreneurial Skills	5/10
Language option	3/10
Introduction to Philosophy	5/10
Modern Philosophy	4/10
African Philosophy	4/10
World civilisations	2/10
Great Books	2/10
East African Societies	2/10
Contemporary Social Issues	2/10

Our conclusion is that Kenyan universities are not doing more to address human and social development because in the short-term this produces meagre financial returns and attracts no social sanction. Both universities and society are prisoners of a narrow understanding of development, exclusively based on a measurable quality of life. But universities are also threatened by a consensus culture which values more bottom-up participation and equality than authority and hierarchies, agreement more than confrontation.²⁶ ‘To be genuine, the consensus process has to be inspired by and to reflect, from start to finish, a search for the truth and the good of all people and has to be founded on what is capable of uniting them in a truly universal way.’²⁷ To disregard this aspect of education will not result in a loss of business or reputation for local universities: after all, the ignorant are easy to satisfy and the discerning rich can get it elsewhere if they so wish.

(g) Economic Freedom and Foreign Aid

Economic success is strongly correlated with economic freedom according to the “Economic Freedom of the World 2006 Annual Report”. This is reflected in the average per-capita GDP, per-capita economic growth, unemployment, life expectancy, percentage of children in the labour force, average income of the poorest 10% of the population and political rights.²⁸ According to the Report Kenya ranks 68th in the world, behind Uganda and Tanzania, who are both ranked 65th.²⁹

The Report also denounces the negative impact of foreign aid:

The United Nations and other bodies have called for more foreign aid to help lift developing nations out of poverty. These groups believe increased aid is necessary to meet the United Nations Millennium Development goals, which include promoting growth, providing universal education, reducing the spread of HIV/AIDS, and halving extreme poverty. Yet, the demand for foreign aid is typically made in the absence of any empirical evidence that it leads to benefits for recipient nations and without asking whether there are better approaches to poverty reduction for the international community to support.³⁰

26 Marguerite A Peeters, (2007) ‘The Globalization of the Western Cultural Revolution’: *Institute for Intercultural dialogue dynamics*, page 146.

27 Marguerite A Peeters, page 147.

28 James Gwartney et al, ‘Economic Freedom of the World’ (2006) *Annual Report: The Fraser Institute*, Canada, pages 3–4.

29 James Gwartney et al, page 13.

30 James Gwartney et al, page 4.

It further adds that “a key component of the success created by economic freedom is the ability to experiment, find economically successful areas of production, and prune those that do not succeed so that resources may be transferred to where they are most productive”.³¹

The EFA Global Monitoring Report 2008 is extremely guarded about the impact of aid. It states that over the past two decades, many attempts have been made to assess empirically the quantitative impact of aid on economic development. “Despite their large number and their variety, these studies are inconclusive. Some find an unambiguously positive relationship between aid and economic development, others find no relationship, while a third set of studies concludes that the effect depends on the quality of institutions and policies.”³²

From a quantitative point of view the assessments do not look much better. In the case of the World Bank the EFA Global Monitoring Report 2008 states the following:

World Bank-supported projects are self-evaluated. Ratings are assigned for outcomes in relation to objectives, sustainability and impact on institutional development. In terms of meeting objectives, primary education projects rated higher than all education projects and projects across all sectors combined. However, only around 60% of them were rated as likely to be sustainable. More worrying is that only 25% were judged to have had a substantial impact on institutional development across the sector, compared with 46% of all education projects and 36% of all Bank-supported projects. For projects completed since 2000 the rating improved to 38%, but it is clear that even the largest donor to the education sector has not succeeded in encouraging the implementation of effective capacity-development programmes.³³

We do not know of any study on the impact of foreign aid on Kenyan public universities, but Strathmore has its own experience. Strathmore College³⁴ Phase I and II were developed with the support of the Kenya Government, the European Union and the Italian Government. The European Union also sponsored the development of the Eldoret Polytechnic in parallel and monitored both projects closely. We could never access information to compare the performance of both projects, but we completed ours years ahead of the Eldoret Polytechnic. Although this is a possible area of research, we think Strathmore was able to accomplish Phase I and II successfully because of the freedom it had to operate and its work-culture. Strathmore attempted several other activities that prove the importance of

31 James Gwartney et al, page 4.

32 ‘EFA Global Monitoring Report 2008’, (UNESCO, Oxford University Press) page 169.

33 EFA Global Monitoring Report 2008’, page 170.

34 The institution that preceded Strathmore University was Strathmore College, founded in 1961.

freedom and responsibility, and the need to be transparent and accountable to stakeholders:

Projects initiated by SU	Performance indicators
Staff loans	Rate of default
Co-operative	Yearly audited accounts
Provident fund	Yearly returns
Endowment fund	Yearly audited accounts
Strathmore Research and Consultancy Centre	Yearly audited accounts
Strathmore University Foundation	Yearly audited accounts

(g) Strathmore University and its Stakeholders

In 2003 SU got International Standards Organisation (ISO) 9000 certification. The rationale was to institutionalise the drive for quality and make it sustainable, but one of the main achievements of the exercise was that it helped several departments of the University to identify better their stakeholders in order to serve them better. As a result the Tutorial Department evolved into a Mentoring Department; Attachment and Placement functions were separated; an Advancement and External Relations Office was set up to fundraise and deal with donors; a University Relations Department was created to take care of Alumni, Public Relations, Marketing and Community Outreach Programmes; the commercial ventures of the University were entrusted to Strathmore Research and Consultancy Centre. The University had to outsource student accommodation and therefore an accreditation system was developed to guide students and guardians; this accreditation system was entrusted to the Admissions Office. The effort to get ISO certification enabled Strathmore to later on shape a development strategy encompassing all its stakeholders. Indirectly it also helped Strathmore address the tension between growth and equity, although this matter requires further research.

(i) *Mentoring*

Strathmore authorities are convinced that a good University is marked by three characteristics: search for truth, a passion for freedom and a spirit of service.³⁵ These are values that only gradually can become part of the culture of an institution. Academic staff is expected to share in this outlook and transmit it to students by their example and through the mentoring system. The University has developed a training programme for mentors but this is an area in which progress has been slow because a new culture requires time to develop a new mind-set.

Searching for Truth is not only about studying but also reading widely, thinking and doing research. The University has set up a fund to facilitate research/facilitate research activities carried out by its staff amongst its staff. It has also set up a training fund which at present sponsors 55 members of staff and dependants to various programmes. This concern led the library to extend its working hours and expanded the support for extra-curricular activities for students.

A Passion for Freedom highlights the importance of developing critical thinking, forming opinions and seeking dialogue with people who may think differently while respecting their views. The Student Council, recently introduced, is a forum to practice this respect for freedom as well as discipline and good manners. Perhaps the most controversial detail of Strathmore culture is its dress-code that seems a direct attempt against the freedom the institution claims/alleges to support,³⁶ In fact, it is meant to convey the idea that freedom goes hand in hand with responsibility, and therefore should be compatible with good manners and respect for others.

Spirit of Service is about doing things for others to advance the common good. It specifically addresses the tendency that higher institutions have to become ivory towers and forget the social dimensions of knowledge. The University co-ordinates voluntary community services to foster a culture of solidarity and is slowly developing links with partners to foster sustainable development: at present there is a Community Outreach Club with more than 100 members. The Community Outreach Programme supports eight schools and is working with a variety of institutions in the Kibera and Mukuru slums which house hundreds of thousands of people.

Strathmore University aims at the all-round education of its students. This means that their formation extends beyond getting a degree to values, skills and

35 Some of these ideas are taken from Strathmore University Mentoring Guidelines.

36 John Muchiri, 'You can't strut your stuff, say killjoy colleges', Daily Nation, 19 October 2008.

behaviour. This particular outlook has crystallised in a style of work which tries to resemble the efficiency of a modern corporation and is based on assuming responsibility for the consequences of personal actions. This style encompasses co-operation and teamwork as a means of building up a positive approach to ethnicity and reaching further. It also includes time management and punctuality together with quality-work, as necessary components of corporate efficiency. This work-style demands a behaviour characterised by respect, cleanliness, order, care for property and equipment, and any other detail that can foster a good working environment.

(ii) Attachment Office

All degree students at Strathmore are supposed to do community attachment during the first half of their degree, and an industrial attachment during the second half. The experience gathered so far shows that if SU were to focus the community attachments on a few locations, perhaps it could achieve sustainable results. At present there are attachments all over the country which are difficult and expensive to supervise. If they were concentrated in one of the Nairobi slums for example, the supervision could be more effective, expertise could build up and there would be continuity in the work with our stakeholders. However, the main beneficiaries of community work are SU students because they learn in a practical way to put knowledge at the service of society.

(iii) Placement Office

This office placed 124 students in the year 2006, 157 in 2007 and 33 in the first half of 2008, which shows a considerable drop from the previous two years, most likely due to the post-election violence. Although originally it was established to serve students, it has also become a channel to market University 'products' and get feedback from employers on the quality of SU education.

(iv) Community Outreach Programme (COP)

The activities of the Community Outreach Programme have increased significantly during recent months because of the post-election violence and the need young volunteers felt of doing something for others. The Advancement and External Relations office has also been instrumental in this success by cultivating partners willing to finance COP activities. The pressure to report to donors and the understandable desire of making a sustainable impact led to the strategic decision of partnering with at least one school in each province. The following is a summary of COP projects undertaken during the 18 months between January 2007 and July 2008.

Date	Activity	Details	Volunteers	Amount spent in Kshs
April '07	Business Course for Kibera Youth	Taught young entrepreneurs Computer and Business Skills.	21	99,940
Date	Activity	Details	Volunteers	Amount spent in Kshs
	Community week	Naivasha Prison Kenyatta Hospital Children's Homes Kibera Ngara Dagoretti HIV/AIDS Home Blood donation	110 120 62 62 120 62 132	61,800
September 2007	Business Course for Kibera Youth	Taught young entrepreneurs Computer and Business Skills.	23	99,940
	Filling potholes along ole Sangale Road		25	7,500

	Christmas Activities	Donated books to Shariani School	22	17,000
		Visit to Dagoretti Children's Home		15,000
Date	Activity	Details	Volunteers	Amount spent in Kshs
February-March 2008	Visits to Displaced people	Thika	62	120,000
		Tigoni	65	40,000
	SU Donation to displaced people			100,000
	Home Visits	Mothers of Mercy (Kiambu)	20	10,000
		Immaculate Children's Homes- (South C)	32	10,000
			62	36,000
		AIC Children's Home (Nyahururu)	32	10,000
		Huruma Children's Home (Ngong)	6	15,000
		Kwetu Children's Home		
March 2008	Team Building for COP Members (Ngong Hills)		62	12,000

April 2008	John Paul II School	Donation of Cameras, books, Scholarships to 21 students		336,000
June 2008	Ikumbo Sec School (Meru)	Building a classroom		360,000
Date	Activity	Details	Volunteers	Amount spent in Kshs
July 2008	Musoli Girls School-Kakamega	Motivational talk	3	27,000
July 2008	St Gabriel School	Donation of Lab equipment		448,000
	TOTAL		1225	1,915,180
	Subtotals	Foreign Donors		1,343,880
		Student/staff donations		248,540
		SU expenses (excluding COP staff salaries)		322,760

Although originally COP was a strategic activity of the University Relations Department to advance SU's corporate image, it is now becoming evident the potential it has to foster the human development of SU staff and students. COP has not yet developed the instruments to assess the effectiveness of these activities, but it is truly amazing the impact KShs 263.48 per volunteer can have (excluding COP salaries).

II. CONCLUSION

Universities have a huge potential and a huge responsibility to improve the human and social development of their stakeholders and indirectly spread peace. The experience of SU is not unique, but hopefully shows that institutional growth and social equity are compatible with long-term intangible targets such as human and social development.

THE LAND QUESTION IN KENYA: LEGAL AND ETHICAL DIMENSIONS

Patricia Kameri-Mbote

I. INTRODUCTION

Land remains the single most explosive issue in Kenya. It was a major issue in the quest for independence. Various commissions have been tasked with looking into the land question from colonial times to the present. The Njonjo Commission Report lays out the land question very clearly tracing its genesis to colonial times when the objective was to entrench a dominant settler economy while subjugating the African economy through administrative and legal mechanisms. It also problematises the issue with respect to the ten-mile coastal strip and the entire country. The land question, the Report posits, has over time been shaped by economic, political, social and legal parameters. These include the dependency of the economy on land, making the issues of tenure, access, distribution and regulation critical. Indeed, contestations over land are at the core of tribal clashes that have been witnessed in Kenya over the years.¹ Most recently, the violence that was sparked off by a disputed presidential poll result had land as one of its underlying causes. The Annan-led mediation talks that brought the contending parties together to form a grand coalition government identified land reform as critical to finding durable peace in Kenya.

Looking at the way grievances over land have been articulated over time, it is apt to say that there is not just one land question in Kenya but multiple land questions begging for attention and resolution. The draft national land policy attempts to resolve these issues using different strategies and mechanisms. While there is consensus among Kenyans that the land question(s) need(s) to be addressed and some reports have detailed prescriptions on what should be done, the proposals have not been implemented.² The contention is largely between using land rights to achieve broader goals of justice and equity on the one hand and protecting legal titles to land, however obtained, on the other. The latter debate is captured within the provisions of section 75 of the Constitution on the protection of property which is read as making property rights sacrosanct. The former seeks to restructure land rights' holding taking into consideration the gross disparities in land ownership and gender and transgenerational discrimination in succession, transfer of land and land decision-making processes.

1 1992, 1997 and more recently in 2007.

2 Bomas Draft Constitutions and the Ndung'u Report on Illegal/Irregular Allocations of Public Land.

We argue here that an effective and holistic way of dealing with the land question requires reconsideration of the dictates of legality taking into consideration economic, social, cultural, environmental, political and ethical dimensions from the colonial times to date. Cancelling sacrosanctity of title when past acquisitions and dispositions are perceived as unjust will not result in respect for property rights by those who feel unjustly treated. Moreover, there are other interests over land such as catchment functions and ecosystem services that dictate a reconsideration of the land question. For instance, the case of the Mau Forest, a major water tower in Kenya, illustrates that the regime of land rights in Kenya is a barrier to sustainable management of a critical ecosystem and that there is need to consider ways of dealing with such issues when they arise without being unduly constrained by law. This paper proceeds from the premise that land is a very critical resource in Kenya, has multiple value, and, as the basis of Kenya's territorial sovereignty, needs to be addressed in such a way as to secure those diverse values. More fundamentally, land has to be dealt with in a way that embeds the greater public interest, which is the maintenance of the country's social, political and economic integrity, for the best interest of all Kenyans.

Other broad issues that require consideration relate to fairness, inclusion and equity. There are categories of persons that have been excluded from land ownership and access such as women and youth. It is important that these categories are addressed in land reform programmes. Pastoralism as a land-use has also been marginalised despite its persistence and it needs to be addressed.

This paper is divided into five parts. Part I is the introduction which lays out the purview of the paper and the nature and basis of property rights in land. Part II outlines the historical and contemporary manifestations of the land question. Part III looks at the legal and ethical considerations of the land question(s). Part IV outlines the draft National Land Policy Proposals for addressing the legal and ethical dimensions of the land question underscoring the fact that legality must be tempered by considerations of justice if stability in property relations is to be achieved in Kenya. Part V comprises the conclusion and way forward.

I. INTRODUCTION

(a) Property as a social relationship

It is the duty of law as the expression of the will of the people expressed through the sovereign to provide mechanisms for the protection of property in the interest of all its citizens. This brings to the fore the conception of property as a social

relationship even while it has an individual side. The Ghanaian Constitution captures this in the following parlance:

The State shall recognise that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the State shall recognise that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in this regard.³

This supports the social utility theory view that law should promote the maximum fulfilment of human needs and aspirations and that legal protection of rights should thus aim at that. The social utility theory places emphasis on the individual as the locus for the grant of rights. Within a country with plural legal entities such as Kenya and Ghana, it is clear that there is need to include other actors such as communities and families.

Property deals with value-enhancing relationships regarding assets just as the legal enforcement of property rights enhances the owner's probability of retaining possession. It could mesh with assets that are not capable of being commodified⁴ as property such as belonging to a group for a bereaved widow, kinship and other familial ties. Indeed, the value of property increases with each additional subscriber and the utility of property draws from the network of subscribers who can keep away the free-riders. The state provides the mechanism for public enforcement of property as a public good ensuring that the law standardizes forms of property and reduces the costs of investigating.

(b) Land as Property

Land as property draws from the universality of the theory of property in time and space with the earliest theoretical explanations of property being occupation where property belongs of right to him who seizes it first. Other theoretical explanations of property draw from:

- (i) *Natural Rights* – property right as a natural right, part of nature;
- (ii) *Social utility* – property as index of social progress since property was originated for social reasons and has developed under public sanction;

3 Constitution of the Republic of Ghana (1992), section 36(8).

4 Margaret Jane Radin, explaining the distinction between fungible (not unique and not linked to persons) that is easily amenable to transaction in the market, and non-fungible property (unique and personal as part of owner's personality; sentimental, emotional link) whose value to the owner is beyond the market. In Margaret J Radin, 'Reinterpreting Property' (University of Chicago Press, 1993).

- (iii) *Labour* - real title to property derived from the toil and trouble experienced by creating it;
- (iv) *Legal theory* – whatever is recognised as property by law is deemed to be property and land as one. The legal theory of property tells us what is property as opposed to the economic theory which explains why something is property.

The term land has a wide connotation both in African customary laws and under modern systems of law. Its subject matter includes the surface of the soil, the things on the soil enjoyed as part of the land such as the air, water and growing trees or artificially fixed attachments such as houses, buildings and other structures. It also encompasses parts of buildings with the division anticipated to be either vertical or horizontal or otherwise, and includes tenancies, easements, rights, privileges or benefits in, over or derived from land.

The maxim *Cuius est solum eius est usque ad coelum et ad inferos* (He who owns the land owns everything reaching up to the very heavens and down to the depths of the earth) underscores the sacrosanct nature of property rights in common law which vested the owner of property with all the rights necessary for enjoyment of property. By dint of the maxim, any conveyance of land includes all erections, fixtures, sewers, drains, watercourses appertaining to the land. This was further amplified by the maxim *Superficies solo cedit* (a building and other constructions become part of the ground). It is therefore not surprising that commentators like Blackstone should opine that:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right to property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.⁵

This has been explained in the context of Kenya by Miller who notes that a land fever grips Kenyans intertwining modern and traditional values since it offers basic survival opportunities in an insecure situation where there is no welfare system and no other forms of wealth are available.⁶ This view colours the value of land and land use patterns.

The question to ask at this point is whether the institution of property rights in land as currently enforced in Kenya enhances social relationships and whether it takes on board the social dimensions that have great implications on its efficiency

5 William Blackstone, *Commentaries on Laws of England*, ed by Wayne Morrison (Routledge Cavendish, 2001).

6 Roger Yeager and Norman K Miller, *Wildlife, Wild Death: Land Use and Survival in Eastern Africa* 98 (New York: State University of New York Press, 1986).

and effectiveness. In answering that question, it is useful to look at some of the pointers to a working property rights system, namely: predictability, stability, justice and fairness. Land in Kenya is currently designated as government land, trust land and private land. The most predominant mode of landholding is trust land which is managed by local authorities on behalf of communities. Trust land was further divided into two: that awaiting adjudication and registration under the Registered Land Act and that which was to remain as trust land. The process of adjudication and registration has not been completed and the management of trust land has over the years grossly undermined communities' rights and interests defeating the original intention. Tenure is not secure for people living in these lands.

Another category of landholding which traverses both community and private landholding is the group ranch system.⁷ The group ranch status in Kenya is granted to a group of herders that is shown to have customary rights over the range or pastureland in question. Group ranches have progressively been converted to individual holdings and the land use changed from pastureland to agricultural holdings. This circumvents the original intention of keeping the integrity of the range and in some areas has impacted negatively on the conservation and management of wildlife.

While individual landholders, who comprise a minority of Kenya's population, enjoy predictable property rights, our argument is that the competing contestations over property held under formal law make such rights unpredictable. The contestations arise from a number of reasons. One is the creation of private land rights from trustland without consultations with the communities. Two, the creation of private holdings in group ranch areas without considering the compatibility of land uses and the interests of the broader community. Three, there may exist gross disparities in landholdings between people living in the same area. Four, there are dispossessions such as historical injustices, gender and generational exclusions and marginalisation of some land uses and users. These have lingered for a long time creating perceptions of unfairness and wrong in the creation of land rights and thus nuancing any claims to these rights. The possession of a legal title to property in these circumstances does not guarantee uninterrupted enjoyment of the property precisely because the legal title is laced with contesting claims. Land as a social relationship depends principally on the acceptance by one's neighbours of the

7 See Report of the East Africa Royal Commission of 1953-1955, Cmd. 9475 (1955) concluding the policy on land tenure in the East African Protectorate, as Kenya then was, noted that while individualization of land ownership should be the main aim, such ownership should not be confined to individuals but could also be extended to groups such as companies, co-operatives and customary associations of Africans. [351]

legitimacy of their claims and it is this acceptance that keeps people away. Where people perceive some inalienable rights in the *res* that is claimed as property by another, the costs of protecting the property rise exponentially.

The 'bundle of entitlements' over land is as extensive as is the importance of land in a country such as Kenya where land is critical to the economic, social and cultural development of the country; it is linked to sovereignty and was a key factor in the struggle for independence; it is a politically sensitive issue and culturally complex; and it has spiritual and religious dimensions in communities that perceive it as a host of the spirit of the community and the residence of the deity. The question to be asked at this juncture is whether given the importance of land, the bundle of entitlements should vest in any one person or entity. Decisions may need to be made about unbundling land entitlements and vesting diverse aspects on diverse entities while securing the broader public good over the land. The National Land Policy proposes three possible *loci* for entrusting the bundle: Individual; Community; National Land Commission. This approximates to the different types of landholding identified.

II. HISTORICAL AND CONTEMPORARY MANIFESTATIONS OF THE LAND QUESTION

(a) Origins of the Land Question

The Njonjo Commission and the draft national land policy both trace the genesis of the land question from the colonial times when the objective was to entrench a dominant settler economy while subjugating the African economy through administrative and legal mechanisms. It also problematises the issue with respect to the ten-mile coastal strip and the entire country. The land question, the Report posits, has over time been shaped by economic, political, social and legal parameters. These include the dependency of the economy on land, making the issues of tenure, access, distribution and regulation critical. The political nuance of the land question is pegged to the administrative and political control of the economy based on land. The land-social structure nexus is clearly discernible in the African economy where the communities remain largely dependent on land for livelihoods as well as economic activities. The functions of law in this context and from a historical perspective have been instrumentalist and geared to secure the dominant actors' interests both to give it legitimacy as well as to entrench it. The process of land tenure reform, it has been argued, introduced a novel and alien concept of property relations in Kenya, namely, the state-land relationship with the assertion of the protectorate as a political entity owning land and granting to

property users subsidiary rights.⁸ At the time of Independence, there were three substantive regimes in property law⁹ and five registration systems¹⁰ supported by administrative institutions to effect the objects of the regimes. The net effect of this was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of African peasantry. The duality was manifest in:

- (a) Systems of land tenure based, in the one case, on principles of English property law and, in the other, on a largely neglected regime of customary property law,
- (b) A structure of land distribution characterised by large holdings of high potential land, on the one hand, and highly degraded and fragmented small holdings on the other;
- (c) An autonomous and producer-controlled legal and administrative structure for the management of the European sector, as opposed to a coercive control structure for the African areas; and
- (d) A policy environment designed to facilitate the development of the European sector of the economy by under-developing its African counterpart.

(b) Colonial Underpinnings of the Land Question

It was expected that the transfer of power from colonial authorities to indigenous elites would lead to a fundamental restructuring of that legacy. This did not materialise and the result was a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. This was because the decolonisation process of the Kenya colony represented an adaptive, co-optive and pre-emptive process which gave the new elites power to gain access to the European economy.¹¹ It had to be moulded firstly, in a way that allowed the settlers to adapt to the changed economic and political situation by identifying new centres of influence that were not overtly political. Secondly, it had to achieve the aim of

8 See HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, (Nairobi: African Centre for Technology Studies Press, 1991), noting that the introduction of new tenure system constituted "legal-structural authoritarianism". This is the origin of government ownership and eminent domain theory in property relations in Kenya. See also Norman Leys, *The Colour Bar in East Africa* (London: The Hogarth Press 1941).

9 The Transfer of Property Act of India, 1882, the Registered Land Act, Chapter 300 of the Laws of Kenya and customary law.

10 Registration of Documents Act (Chapter 285), the Registration of Titles Act (Chapter 281), the Government Lands Act (Chapter 280) the Land Titles Act (Chapter 282) and the Registered Land Act (Chapter 300).

11 Gary Wasserman, 'The Independence Bargain: Kenya Europeans and the Land Issue 1960-1962', 11 *J Comm Pol Stud* (1973).

socialising the new elite into the colonial, political, economic and social patterns to ensure that this elite was able to rule functionally on an inherited political structure and co-operate with the outgoing rulers. Finally, the process was geared towards preventing the mobilisation of a nationalist base that would be opposed to continuation of colonial policies after independence.¹² Property rights protection was deemed imperative for the conclusion of the independence talks held in Lancaster House from 1960 to 1962.¹³ Having worked out an acceptable bargain, the new rulers set about consolidating their power in the new state. The issue of the landless natives proved a thorny one for this new government, prompting it to institute measures to appease vocal Africans still clamouring for the land taken from them.¹⁴ Within a few years into the Independence period, smallholders in Kenya had become the main driving force behind agricultural production.¹⁵

The alienation of customary African lands formed part of a larger pattern of restructuring African land use systems.¹⁶ The introduction of tenure reform in Kenya leading to individual rights to land was not informed by the needs of agricultural production or ecosystem sustainability. It was informed by a perceived need of the colonial authorities to entrench themselves firmly in Kenya and maintain the rights they had to land without having to give back any of them to the natives. The African landed gentry, a small and very powerful minority, proved invaluable and ensured that property rights systems introduced during colonialism continued operating even after power was passed on to the new government at Independence.¹⁷

Thus the granting of property rights to ordinary Kenyans was more in a bid to justify the rights already granted to the settlers and elite Kenyans.¹⁸ The content of

12 Gary Wasserman.

13 Report of the Kenya Constitutional Conference (1962).

14 The White Highlands remained settler occupations and the settlers who wanted to divest themselves of rights in them sold their land for full value to Africans who could afford to buy it. Settlement schemes were, however, established in the Rift Valley to accommodate the landless. Some Africans questioned the repayment of loans advanced by the British government to the independence government to buy settler farms for resettlement of Africans. See Ann Seidman, *Agricultural Revolution*, 7 *East African Journal* 25 (1970) and Jaramogi Oginga Odinga, *Not yet Uhuru* (Nairobi: Heinemann, 1967).

15 Aaron Segal, *The Politics of Land in East Africa*, XIV *Africa Report*, 46 (1967).

16 A Report of the Biodiversity Support Programme (USAID, WWF, Nature Conservancy, WRI), *African Biodiversity: Foundation for the Future* 4 (1993).

17 See Sorrenson *supra* note seems to be a first citation. See Ng'weno Osolo-Nasubo, *A Socio-Economic Study of The Kenya Highlands From 1900-1970: A Case-Study of The Uhuru Government* (Washington D C: University of America Press, 1977).

18 See Jomo Kenyatta, *Republic of Kenya, African Socialism and its Application to Planning in Kenya* (Republic of Kenya, 1965).

these rights was only co-extensive with the latitude the state permitted the property holder given the insulation of these ordinary Kenyans from the effects of property rights so as to prevent massive landlessness.¹⁹ The assertion that a privilege or liberty is valueless if its holder does not have the economic or physical strength to use it rings very true for ordinary Kenyan property rights holders. Indeed, most African communities whose entire existence was predicated on land and environmental resources perceived colonial policies as a direct intervention in the relationship between them and their means of subsistence and production.

(c) Post-Independence Nuances of the Land question

Immediate post-Independence handling of the land question brought forth other contestations over land. The Swynnerton Plan²⁰ had recommended tenure reform through the consolidation of land holdings of families into one, followed by the adjudication of property rights in that land and the registration of individuals as absolute owners of land adjudicated as theirs. This process coincided with increased political agitation among Kenyans for the return of land that had been taken by the settlers. The tenure reform process coincided with a deteriorating political climate centred on the land issue and this undergirded the handling of the land question in post-independence Kenya. One was the grant of land belonging to freedom fighters' to loyalists during the Mau Mau revolt and the insulation of the ensuing land rights from contesting claims.²¹ For instance, a large part of Central Province was consolidated in 1956 with a state of emergency in place.²² The net effect of these laws was to close avenues available to aggrieved landholders and dispossessed peasants. Subsequent laws on land tenure adopted these provisions.

Two, the resettlement programme through which the government allocated land to squatters in parts of the country other than where they originated from,

19 The registration statute in Kenya was accompanied by the Land Control (Native Lands) Ordinance whose purpose was to control all dispositions in registered land including transmissions by way of succession except where no sub-division was involved.

20 See RJ M Swynnerton, *A Plan to intensify the development of African agriculture in Kenya* (Nairobi, Kenya Dept of Agriculture, 1954).

21 African Courts (Suspension of Land Suits) Ordinance was passed in 1957 to bar all litigation to which the 1956 Rules applied.

22 The Kikuyu districts of Kiambu, Nyeri and Fort Hall (now Murang'a) (comprising Central Province), and Embu and Meru (comprising part of Eastern Province) were among the first areas where tenure reform was carried out. See e.g., figures given in JD MacArthur, 'Land Tenure Reform and Economic Research into African Farming in Kenya', 8 *East African Economic Review* 82 (1961). Consolidation consisted of the process of amalgamating all the pieces of land owned by one person to determine the acreage such person was entitled to. It would be followed by adjudication, namely, a determination of the rights of each person to that land, and then registration that vested absolute rights in the registered proprietor to the land.

principally the Rift Valley and the Coast. The perception that 'outsiders' had been brought to take land belonging to 'insiders' without taking into account the rights and interests of the 'insiders' has made the 'outsiders' vulnerable as their rights to land are contested. The 'outsiders' comprise not only the resettled people but people who bought land either through land-buying companies or other private transactions.

Three, the failure of post-independence national leaders to craft a cohesive national polity resulting in people relying principally on their tribal/ethnic alliances to access resources including land. Successive governments, particularly the Kenyatta and Moi ones, have used the allocation of public land to reward supporters, gain favours from their supporters or to ensure political patronage. The quest for different ethnic communities to get one of their own into State House has a lot to do with perceived enhanced access to resources that 'their Man' will ensure, going by past regimes. Consequently, there are very high stakes in each general election for different ethnic communities and their allies. Interestingly, Moi's defence of the singleparty state was based on his belief that multi-party politics would undermine 'the State, polarize the country along tribal lines and plunge it into ethnic violence'.²³ His prophesy has been fulfilled because politically instigated tribal clashes touching on land have been witnessed in Kenya from the first multi-party election in 1992 to the 2007 one, which was by far the worst.

Four, the persistence of customary practices and beliefs that marginalise women and the youth and exclude them from land ownership in favour of older males. With the HIV/AIDS pandemic, many women and children have lost access to land to male relatives of the deceased husband because of the customary belief that women cannot own land and the minority legal status of children. The emergence of child-headed households necessitates a reconsideration of the exclusions.

Forty years after independence, the land question is still a vexing one. This can be attributed to a number of issues which are well documented in the Issues and Recommendations Report produced as a background to the National Land Policy. These include:

- (a) Over-emphasis on land as the major productive resource;
- (b) Rapid population growth resulting in severe land pressure and fragmentation of land holdings into sub-economic holdings especially in Central Province, the Eastern slopes of Mount Kenya and Western Kenya;

23 Kenya Human Rights Commission and International Federation for Human Rights, 'Massive Internal Displacements in Kenya due to Politically Instigated Ethnic Clashes: Absence of Political and Humanitarian Responses', number 471/2, (2007)71/2il 2007.

- (c) The breakdown in land administration and land delivery procedures;
- (d) Over-centralized and inaccessible land administration and land delivery procedures;
- (e) Rapid unplanned urbanization and resultant uncontrolled developments;
- (f) Diminishing forest cover that threatens survival of the populace as well as the pivotal role that land plays in Kenya – declining land-carrying capacity;
- (g) The rise in the level of poverty due to lack of capacity to gain access to clearly defined, enforceable and transferable property rights;
- (h) The multiplicity of legal regimes that relate to land and the confusion caused by the involvement of unauthorized persons in land administration matters;
- (i) Emergence of environmental management legislation which require the development of land to be carried out sustainably and demand a positive environment impact assessment study;
- (j) The gross disparities in land ownership with regard to gender and generational discrimination in succession, transfer of land and the exclusion of women and the youth in land decision-making processes;
- (k) The poor management of essential infrastructure that inhibits sustainable development of rural areas, particularly roads, communications, power and water supplies; and
- (l) The privatization of public land through wanton and illegal allocation of such land to private individuals and corporations in total disregard of the public interest in the post-independence period, popularly known as land-grabbing.

The impacts of these developments have been many and varied such as:

- (a) Severe land pressure manifested, *inter alia*, in terms of fragmentation and sub-economic parcellation of land particularly in the high potential areas of the small farm sector and changes in land use patterns;
- (b) Deterioration in land quality as a result of poor land use practices; twin issues of squatters and landlessness;
- (c) Unproductive and speculative landholding, especially by the elite;
- (d) Disinheritance of women and weaker members of the community and at times, biased decisions by land tribunals, committees and boards;
- (e) Utilisation and abandonment of agricultural land especially in areas severely ravaged by the HIV/AIDS pandemic;
- (f) Poor health, malnutrition, non-productive labour force leading to low economic growth and productivity;
- (g) Uncontrolled urban squalor and, especially, environmental pollution as a result of lack of proper solid waste disposal;

- (h) Severe tenure insecurity due to the existence of overlapping rights especially at the interface between rural and urban areas; Wanton destruction of forest, catchment areas and areas of unique biodiversity;
- (i) Severe competition between wildlife's needs and those of human settlements;
- (j) Inter-ethnic resource conflicts especially in areas originally expropriated for resettlement; and
- (k) Confusion of the public by the many land statutes.

These problems require a holistic re-examination of the land question. It is no longer tenable to argue that title to land is sacrosanct when title holders are residing in camps as internally displaced people with title documents at hand. Indeed, holders of title to land need to be proactive and work with the government in finding durable solutions to the land question. If this is not done, the cost of protecting property rights in land will escalate as the number of people seeking to access those rights (legally or illegally) increases marginalising the holders of title to land who continue to be a minority.

III. LEGAL AND ETHICAL CONSIDERATIONS OF THE LAND QUESTION(S)

(a) A Story of Dispossession

(i) *Historical Injustices*

In addressing the land question(s) in Kenya, one has to look at the history of land relations in the country and the term 'historical injustices' has been used to mean land grievances which stretch back to colonial land policies and laws that resulted in the mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date.²⁴

The reference to colonial land policies may mask injustices suffered at the hands of post-Independence governments. It is for this reason that we prefer to use the term 'dispossession' which encompasses issues beyond the colonial period. Dispossession has characterised land relations in Kenya since colonial times when land owned by natives was passed over to the colonizers and their vassals. The underlying assumption was that the colonised had no rights to land either as individuals or as groups. For instance, in the case of *Isaka Wainaina and another v Murito wa Indagara and others*, Chief Justice Barth's interpretation of the provisions of the 1915 Crown Lands Ordinance in Kenya was to the effect that Africans were

24 Republic of Kenya, Draft National Land Policy, 2007.

mere tenants at will of the Crown with no more than temporary occupancy rights to land.²⁵ This ignored any rights existing under customary law. The nullification of natives' rights to land in favour of new 'owners' through processes that were not understood by the natives created a duality of rights' systems. Indeed, the acquisition of land rights for settlers was mainly done through political processes (declaration of protectorate, designation of land as owned by the colonizer etc) that were followed by legal instruments giving the political acts the requisite binding force.

Dispossession from land also entailed dispossession from resources that people depended on for their livelihood. Wildlife and forest preservation areas were carved out of land previously occupied by the natives but that had been expropriated from them and declared crown land. In other cases, areas were declared protected and the interests of wildlife and forest conservation promoted in total disregard of the concerns of the communities living in them. The boundaries of what was designated as the Southern game reserve in Kenya, for instance, practically coincided with those of the Maasai native reserve.²⁶ Thus communal wildlife and forest resources were formally made state property and managed by wildlife and forestry departments in total disregard of the prior rights of the natives to those resources and products. Some areas were declared national parks because the colonisers saw no other use for them.²⁷ In this general scheme, however, the rights of the settler farmers to their land and other resources found therein were rigorously protected.

Evidently, the establishment of protected areas entailed the dispossession of people's land (as the habitat for the wildlife or forests) as well as the animals and forest products. This process severed the connections that existed between the natives and their physical environment. It introduced new values for wildlife and forests based on commercial exploitation which were the preserve of the new 'owners' of land and resources. Consequently, the parks were culturally alien to the communities living in and around them.²⁸

The process of dispossession was not uncontested. Communities resisted it but were overpowered and subjugated under the new property ownership systems.

25 Kenya Law Reports Volume IX 102 (1922-1923).

26 Colony and Protectorate of Kenya, Land and Land Conditions in the Colony and Protectorate of Kenya 17 (1931).

27 John Henry Patterson, *The Man Eaters of Tsavo and Other East African Adventures* (1912) giving account of lions terrorizing railway workers.

28 DHM Cumming, 'Conservation Issues and Problems in Africa', in *Voices From Africa-Local Perspectives on Conservation* (23 ed) by Dale Lewis and Nick Carter (World Wildlife Fund, 1993).

Confronting dispossession in many countries thus remains a critical part of the resolution of land and resource crises. This is in a context where such dispossession is not acknowledged and the rights have passed on to new holders. It is also exacerbated by new forms of dispossession through privatization of resource rights (land, water etc) and the consequent passage of public goods into private hands without securing the interests of all actors that have previously had access to the resources.

The Maasai community in Kenya continues to rally around their claim for their land and recently demanded the restoration of their ancestral land following the expiry of the Anglo-Maasai Treaty signed between the British and the Maasai community. Politicians have also used this claim to ensure that they remain in power. For example, the Maasai leader and then Minister for Local Government, William ole Ntimama, in 1992 led a spirited war against communities who practice settled agriculture in his Narok constituency when he launched his so-called water catchment conservation campaign. He is quoted as having asked the Kikuyu in Narok to "lie low like envelopes and threatened to cut them down to size like the Ibos of Nigeria".²⁹ These communities were forcibly evicted from the lands that they owned or had leased without compensation. The government did not raise a finger against the evictions at that point which was just before the first multi-party elections in the country. This was mainly because most of the large tribes such as the Kikuyu, the Luo and the Luhya were overwhelmingly opposed to the incumbent President's party, the Kenya African National Union (KANU) and had joined the opposition parties. KANU was seeking the support of small ethnic communities and needed the areas occupied by these communities cleaned of the members of the communities whose allegiance was suspect to ensure that KANU obtained victory in the elections.³⁰

The post-election violence pursuant to the disputed presidential poll in 2007 resulted in the dispossession of 'outsiders' from land in the Rift Valley. For some of these people, this was the third time they were being displaced from their land. This is discounting the circumstances under which they had moved from their ancestral land (some may have moved as a consequence of displacement). The process of resettling the internally displaced persons is not yet complete and it is likely that some people will never go back to their land. Clearly, legal title to land

29 Mburu Mwangi and Muliro Telewa, 'Keen Rallies Behind Ntimama', Daily Nation, Monday, 27 January 1997.

30 Patricia Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure and Wildlife* (Nairobi: ACTS Press, 2002).

where it exists is not enough to get people back to land that is contested by communities who see it as their land. This underscores the social aspect of property in contradistinction to the legal and economic ones.

(b) Gender and Generational Dispossession

The hallmark of African customary law is the dominance of older male members of the community. In some societies, women are considered perpetual minors. During the tenure reform process in Kenya, most families designated one of their own, usually the eldest son or the male head of the household, to be registered as the absolute owner without realising the latitude that such person would have to deal with the land once so registered. According to the registration statute, a right of occupation at customary law would only be protected if noted on the register, which many families did not bother to do for they saw no possibility of a piece of paper vesting any more rights in the family representative than he would have had customarily. Cases of such family representatives seeking to evict the other family members from the family land escalated.³¹

The creation of reserves and the migration of male members of native communities to plantations and urban areas to seek paid employment, while redefining the mode of production, deeply entrenched the role of women as managers of the local environment. However, after the processes of consolidation, adjudication and registration, women lost control over the resources that they looked after and depended upon to sustain their families. Further, the individualisation of property rights in land and the vesting of those rights in men alienated the women as managers from the ownership of the managed property. The effect of the processes of land tenure change was to remove certain sections of the population, such as women and younger men, from controlling land. Gender neutral land laws applying in gendered contexts exacerbated the situation of women. The application of statutory provisions in these contexts is mediated by customary perceptions of masculinity and femininity and the association of land and related resources with males.

The role of women as tenders of the land however, continued undisturbed notwithstanding the fact that their claims to the land which they managed became more precarious and tenuous.³² With the subsequent introduction of cash crop

31 *Obiero v Opiyo* (1972) East African Law Reports 227; *Muguthu v Muguthu* Civil case number 377 of 1968 (UR) and *Esiroyo v Esiroyo* 1973) East African Law Reports 388.

32 Barbara Thomas Slayter and Dianne Rocheleau, 'Gender, Resources, and Local Institutions : New Identities for Kenya's Rural Women', in *Gender Environment and Development in Kenya-A Grassroots Perspective* 7, ed by Barbara P Thomas-Slayter and Dianne Rocheleau, (Boulder Co : L Reiner ,1995).

farming for Africans and the controls put in place to ensure the adherence to good rules of farming, the workload of women increased without a concomitant enhancement of their *de jure* management and decision-making role. Today women and children perform many tasks associated with land management and play a major role in the agricultural sector, which forms the economic mainstay of the country. They provide the bulk of the labour required for the day-to-day management of farms including planting, weeding, harvesting and processing agricultural produce.

(c) Land Use Marginalisation as Dispossession

Hunter-gatherers, forest dwellers and pastoral communities have been marginalised in development policy discourses. They are inadequately represented in decision-making organs at all levels. The political and economic marginalization of forest dwellers and hunter-gatherers can be traced to the colonial period when, through the Carter Commission, the settlers failed to recognize them as a distinct community, but instead preferred that they be assimilated into their neighbouring communities such as the Maasai or the Kalenjin.³³ Through the forest preservation policy the colonial government denied them the right to live in the forests, forcing them to surrender their community identity through forceful assimilation. In view of this, they became subject to the dominant customs of the neighbouring communities who tried to assimilate them.

Hunter-gatherer communities' rights of access, use and control of land and related resources are threatened by policy and legislative reforms that prohibit the settlement of people in forested areas. This is coupled with other concerns such as: failure by Government to recognize them as a distinct tribe undermines their social-political heritage; non-representation in resources decision-making institutions; frequent evictions; lack of titles; incompatible land tenure system; and lack of infrastructure.³⁴

33 National Land Policy Secretariat, Issues and Recommendations Report (Kenya Land Alliance, 2006).

34 National Land Policy Secretariat, Issues and Recommendations Report (2006).

(d) Law's Response to Dispossession

(i) *Constitutional Protection of Property*

Among the fundamental rights and freedoms guaranteed by the Constitution is protection from 'deprivation of property without compensation'.³⁵ This provision is further elaborated in section 75(1) which provides as follows:

- (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied;
 - (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of property so as to promote the public benefit; and
 - (b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
 - (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

Proof of ownership of land is therefore critical to the enjoyment of these constitutional protections. The main classifications of land ownership in Kenya are individual, government and group or community. Private ownership of property is accorded greater protection in law than group or community ownership with the result that groups and communities seek individualisation of their property as a defence against perceived insecurity of tenure.

The current constitution does not distinguish land from other property and has been largely ineffective in providing an efficient, accountable and equitable institutional framework for land ownership, administration and management. The Land Policy outlines the following as the results of the constitutional deficiencies:

- (a) Centralisation of state responsibility over land matters;
- (b) Lack of governmental accountability in land governance leading to irregular allocations of public land;
- (c) Constitutional protection of private property rights even where they are acquired in an illegitimate manner;
- (d) Mass disinheritance of communities and individuals of their land;
- (e) Inequitable distribution of land in Kenya and denial of access to land rights;

35 Constitution of Kenya, section 70.

- (f) Ineffective governmental regulation of private property rights resulting in unplanned settlements and environmental degradation; and
- (g) Inadequate framework for the taxation of land rights.

(e) Constitutional Protection against Discrimination

Countries have sought the use of human rights norms entrenched in national constitutions as a way of dealing with gender discriminatory customary law. Typically such constitutions proscribe discrimination generally, except in personal law matters; provide for both gender equality and the application of customary and religious laws and leaving the courts to arbitrate on what rights should prevail on a case by case basis; and make customary law subject to the right to equality. These three approaches have their limitations. First, allowing for customary law application in personal law matters maintains biases against women. Secondly, leaving the issue for courts to decide presupposes that the arbiters will not be influenced by prevailing gendered perceptions. Courts may be progressive or retrogressive. There is also the assumption that people will take matters to court, which is fallacious as many land disputes are solved at local levels where people are more sympathetic to and familiar with customary norms.

(f) Inadequacy of Law in dealing with Dispossession

So far law has not adequately dealt with dispossession. There several reasons for this inadequacy. One is the fact that law has at some point facilitated dispossession and given legality to it. Indeed, law has legitimized property claims in land even where past theft and injustice colours that property. Legality, therefore, stands in the way of the resolution of land issues over time. Second, law has not adequately protected the rights of communities and groups and because of its more explicit protection of individual rights, has implicitly encouraged the parcellation of land held by communities and groups into individual holdings in total disregard of broader community interests and sometimes sustainable land use. Third, the development of land law and policy has been largely ad hoc and unsynchronised with land use. There is greater emphasis on landholding than on land use. Not surprisingly, land is parcelled out to individuals without considering the implications of such holding on broader issues such as water catchment functions and productivity.

Responses to law's inadequacy have been self-help remedies as witnessed in the post-election violence and the invasion of land belonging to absentee landlords.³⁶

36 'Tension as mobs invade 'idle' land at the coast', Daily Nation Newspaper, 4 September 2006, describing how residents of parts of Mombasa, mostly youths, wielded pangas and other weapons they had. A few

These incidents, like many others in the last twenty years, have illustrated how owners of land can lose their land to others who believe that they also have a claim to the property in question. As Cronon has argued, ownership is a complex social institution that varies widely between and among cultures and therefore only makes sense if the people with whom the property rights holder lives recognise that ownership and vest in that person the rights to impose sanctions against the violation of those rights by anyone else.³⁷ The issue of the Mau Forest Complex has most recently illustrated the grave consequences of unsynchronised land tenure and use. In this particular case, the argument that communities need to move to make way for preservation of a water catchment area is seen as targeting some communities while others reap rewards from illegally allocated forest land. The complexity of this issue is captured in the following statement:

Some say the people in the Mau have title deeds. But the truth is, they should not have been there. It is like buying a pair of suits from somebody who had stolen it. When you are caught, it will be taken away and then you will be charged with handling stolen property. In our case, we are saying, just give us back the suit; we will give you other clothes to wear. The people in Mau will be given alternative land.³⁸

IV. TEMPERING LEGALITY WITH ETHICAL CONSIDERATIONS: THE NATIONAL LAND POLICY PROPOSALS

The draft national land policy contains proposals that can assist in balancing the legal and ethical dictates of the land question in Kenya. It contains a number of provisions that can be used in the quest for justice and equity. These include: Clear delineation of categories of land holdings into public, community and private with clear mechanisms put in place to govern each category of land; clarifying land management issues; putting in place mechanisms for sustainable management of land; measures for redressing dispossession arising from historical injustices and skewed development policies. I look at three ways in which the proposals of the policy can temper legality with ethical considerations. These include: historical injustices; environmental sustainability; gender and generational equity and regulating land rights in the broader public interest.

days earlier the Kenyan President had been reported in the local newspapers as having put absentee landlords on notice.

37 William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (Farar, Straus and Giroux, 1983).

38 Prime Minister Raila Odinga, in an article titled 'Governance: Raila Confounds Friend and Foe with his Pursuit for Service Delivery', *Standard* on Sunday, 24 August 2008, page 21.

(a) Dealing with Historical Injustices

To deal with dispossession arising out of different circumstances, the National Land Policy proposes:

- (a) Redistribution to provide the disadvantaged and the poor with access to land for residential and productive purposes; address gross disparities in ownership, environmental degradation, gender and trans-generational discrimination;
- (b) Resettlement to grant internally displaced or historically dispossessed persons access to land, and related facilities; and
- (c) Restitution to restore land rights to those that have unjustly been deprived of land rights.

To avail land for redistribution, restitution and resettlement, the Policy proposes the establishment of land banks and suggests that land for the banks would be obtained through purchase and donations.

According to Black's law dictionary, restitution is the act of returning to the proper owner property or monetary value; the act of making good or giving equivalent for any loss, damage or injury; and indemnification

According to Professor Paul Maurice Syagga of the University of Nairobi, Land restitution refers to some kind of compensation not necessarily relating to the value of land but also to other losses emanating from expropriation by the colonial government.³⁹

The right to restitution has its foundations in the law of property, torts and criminal law. From time immemorial, the right to restitution developed as a proprietary right. The Roman law of twelve tables prescribed repayment schedules for theft of property according to when, and under what circumstances the property was stolen.⁴⁰ Subsequently, in the 19th century, under the law of Great Britain offenders were required to restore peace by making payment to the victim and the victim's family.⁴¹

The remedy of monetary or property restitution still exists under the common law of torts and contracts. Similarly, in criminal cases, restitution has traditionally been one of the penalties imposed in return for stolen goods to the victim or

39 Dorthe Skovgaard Mortensen, 'Reclaiming Ancestral Land', available at <<http://www.ms.dk/sw7754.asp>>.

40 449 BC- 'Restitution', Restorative Justice (Prison Fellowship International, 2004) available at <<http://www.restorativejustice.org/intro/tutorial/outcomes/restitution>>

41 'Restitution', Restorative Justice (Prison Fellowship International, 2004) available at <<http://www.restorativejustice.org/intro/tutorial/outcomes/restitution>>

payments made to the victim for harm occasioned. Hence, restitution in criminal cases aims at repairing the victim and making the offender a productive person as opposed to other criminal sanctions like retributive and rehabilitative sanction. Anthropological accounts of the practices of many African communities have tenets of restitution.

(b) Restitution in Contemporary Times

The term restitution has become a term of art in the quest for justice and equity in the realm of property rights to land in post-colonial contexts. Many countries have however, not managed to implement the concept. Indeed restitution is carried out within the context of concretized rights protected by law – a law that may have been sculpted with the express aim of extinguishing and expropriating one entity's rights to land and passing them on to another entity in a form that is sacrosanct in law. Where the rights taken have been exercised without formal legal recognition, there is a conflict of both ideology and law which leads to hair splitting about the nature of the rights and the standing of those rights in law. There is recognition of the fact that a libertarian society needs to protect the rights of all to land and resources. In post-colonial and deeply divided societies, the protection of the rights of all remains a mirage. For instance, the need to protect the rights of the disposed has not been followed by a critical analysis of the processes of dispossession and how this affects people's perception of property rights' holding. Successful restitution must not only address landlessness. It must also go to the core of unjust expropriation and the extinction of one entity's rights and the terms of their transmission to another entity. Justice entails that the terms of restitution be mutually agreed by all concerned parties. Failing to do this will amount to perceptions by those whose rights have been expropriated as legal validation of injustice and will colour their perception of the rights protected by the law making their enforcement onerous. The right to restitution thus has to be crafted on terms agreed to by both the 'restitutee'⁴² and the 'restitutor'.⁴³

(c) Restitution, Justice and the Inalienability of rights

According to Rawls⁴⁴, the concept of justice must achieve three cardinal ends. Firstly, the maximization of liberty subject only to such constraints as are essential for the protection of liberty itself. This, according to Rawls, means that there are

42 The one to whom land is restituted.

43 The one who is giving up land for restitution.

44 John Rawls, 'Theories of Justice', in *Lloyd's Introduction to Jurisprudence*, ed by MDA Freeman, (7 ed) (London: Sweet and Maxwell, 2001) pages 523-534, 566-585.

some rights, which include *inter alia* the right to hold personal property that every system must respect. Secondly, justice must achieve 'equality of all subject only to the concept of differential treatment where inequality produces the greatest possible benefit for the least well-off in a given scheme. Finally, justice must achieve fair equality of opportunity and the elimination of all inequalities of opportunities based on birth or wealth.

Viewing the right to land restitution through the spectacles of Rawls' concept on justice, it is imperative that states must put in place mechanisms to ensure the protection, respect and promotion of individuals' rights to their land and resources. This entails making amends where the taking of the land was wrongful. If we apply the equity maxim that 'no cause arises from a base act', it is clear that dispossession was wrongful and must be redressed if the institution of property is to serve the purposes that it is intended to serve in a country. By so doing, the rights of all citizens to maximize their right to liberty, personal equality as well as equality of opportunities based on wealth will be actualised. This is indeed critical where individuals continue to depend on land for their livelihoods and the national economies of countries are dependent on land and natural resources.

Indeed, land remains a crucial determinant of economic wealth in Kenya and the availability of land is important for both individual and national development. Poverty has therefore come to be linked with the dispossession from past land injustices. Dispossession is also linked to the development of slums in the urban areas which have remained a thorn in the flesh of land owners. The landless poor in urban slums have found new ways of survival through the informal sector which now provides jobs but the overall conditions in the slums are wretched making it fertile ground for political discontent. Indeed, both colonial and post-colonial authorities target slums for demolition as a way of enforcing political control.⁴⁵

This analysis in itself captures the inalienable nature of human rights. For the right to land restitution to exist, the state must first of all guarantee the right to hold personal property, the right to security, the right to development, the right to a healthy environment *etcetera*. Hence, the right to restitution cannot be achieved

45 Jacqueline Klopp, 'Remembering the Muoroto Uprising: Slum Demolitions, Land and Democratization in Kenya', *Journal of African Studies*, 2008, gives an analysis of the demolition operations as follows: in 1953, Mathare shanties seen as a key area for support for Mau Mau were destroyed rendering 7, 000 people homeless. Several other evictions followed suit in which 24, 000 Kikuyu, Embu and Meru were rendered homeless. See also, for instance, on 2 November 1990 a village (Kileshwa Nyakinyua) of 3,300 people was demolished. Similarly, on 5 November 1990 a village of over 3,000 people at Gigiri was demolished on 8 November 1990 Kwambiu village of over 3,000 residents was demolished as well as Kibagare slum, which rendered 30,000 people homeless.

in isolation from other rights. There is, for instance, need to be aware of some attributes of land. One, land appreciates in value and there is need to consider the entitlements of different holders within that context. Two, land can be passed on from generation to generation and there are therefore multiple claims and claimants. Third, land marks the dignity of a nation and is linked to the sovereignty of the state. Further, the state's claim to permanent sovereignty over its natural resources is predicated on land.

(d) Is the Right to Restitution absolute?

The right to restitution is subject to the respect of the rights of others following from the Hohfeldian jural correlatives of rights and responsibilities. It is subject to the rights of third parties who should not be deprived of their rights. Restitution may in some instances not be possible, in which case, there is need for just and fair compensation taking into account the social, cultural, political and economic issues.

Like many other rights, the right to restitution of land is qualified under several circumstances. For instance, where land disposition was predicated on the payment of just and equitable compensation, there is no right to restitution. A vexed question, however, relates to the time frame for consideration of claims for restitution. Countries have found it useful to define a date. For example, under the South African Land Rights Restitution Act, such rights can only be claimed with regard to land disposed before 19 June 1993. In Kenya, the question has arisen within the context of the National Land Policy Formulation Process as to the cut-off date for claims for restitution. Do we begin in 1895 and where do we end? This is within a context where the independence process insulated beneficiaries of colonial dispossession from claims by contestants and where at different times after independence, dispossession has been orchestrated through political processes rendering landless people that have had title to land.

(e) Environmental Sustainability

Kenya faces many environmental problems such as deforestation, air, land and water pollution, wildlife habitat loss, wildlife species' decline, degradation of marine and inland water ecosystems and beach erosion. Land provides an entry point for imbuing environmental sustainability. There is need to align land tenure with land use and to zone the country into broad land use areas so that each area is put to the highest and best use. Innovative uses of land rights to secure environmental sustainability should be encouraged and used. For instance, granting leases and easements to secure wildlife habitat.

To ensure the protection of ecosystems and overall environmental sustainability, the Policy proposes:

- (a) A survey of all critical ecosystems to determine sustainable land uses for these ecosystems;
- (b) Protection of ecosystems through land use controls;
- (c) Define and maintain beaches at high and low water marks;
- (d) Development of a comprehensive and integrated land use policy and ensuring that all land uses and practices shall conform to land use plans and the principles of biodiversity protection, conservation and sustainable development.
- (e) Zoning forest land comprising water catchment areas to protect it from further degradation;
- (f) Development of procedures for co-management and rehabilitation of forest resources;
- (g) Putting in place participatory mechanisms for the sustainable management of fragile ecosystems in partnership with public, private and community stakeholders;
- (h) Declaration of all national parks, game reserves, all islands, front row beaches and all areas hosting threatened biodiversity as fragile ecosystems;
- (i) Ensuring that the development activities in all islands and front row beaches take into account the fragility of the ecosystem
- (j) Prohibition of settlement and agricultural activities in the water catchment areas;
- (k) Identification, delineation and gazettement of all water courses and wetlands; and
- (l) Integrated resource management based on ecosystem structure regardless of administrative or political boundaries.

(f) Gender and Generational Equity

There is need to put in place mechanisms for securing access to land for women and children. Implementation of international obligations relating to women's and children's rights would be a good first step to remove structural barriers to the enjoyment of land rights by these groups. The National Land Policy proposes to protect the rights of women through:⁴⁶

- (a) appropriate legislation to ensure effective protection of women's rights to land and related resources;
- (b) repealing existing laws and outlawing regulations, customs and practices that discriminate against women in relation to land;

46 Republic of Kenya, National Land Policy Chapter 3.

- (c) enforcing existing laws and establishing a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources;
- (d) making provision for joint spousal registration and documentation of land rights, and for joint spousal consent to land disposals, applicable for all forms of tenure;
- (e) securing inheritance rights of unmarried daughters and their children; and
- (f) ensuring proportionate representation of women in institutions dealing with land at all levels.

Within matrimonial contexts, the Policy proposes review succession, matrimonial property and other related laws to ensure that they conform to the principle of equality between women and men; protect the rights of widows, widowers and divorcees through the enactment of a law on co-ownership of matrimonial property; put in place appropriate legal measures to ensure that men and women are entitled to equal rights to land and land-based resources, before marriage (in cases of inheritance), during marriage, upon dissolution of marriage and after the death of the spouse; and putting in place mechanisms to curb selling and mortgaging of family land without the involvement of the other spouse.

(g) Children and Youth

To protect the rights of children and youth, the Policy proposes to:

- (a) Enforce the Children's Act (Chapter 586) laws of Kenya and supervise the appointment of guardians for orphans to safeguard their land rights;
- (b) Review the legislative framework to provide that minority does not constitute a barrier to proprietorship where circumstances indicate that conferring ownership rights upon a minor would be appropriate;
- (c) Review, harmonize and consolidate all the laws relating to children's inheritance of family land in order to recognize and protect the rights of orphans; and
- (d) Review the laws on trusts and administration of estates with a view to ensuring that trustees act in the best interests of the beneficiaries of trusts and estates.

(h) Land Rights in the Broader Public Interest

Given the population growth rates, the sensitivity of the land issue and the importance of land economically, socially and culturally, we need to consider the holding of land as a public trust. We propose that in actualising the principles of land as public trust and to ensure that the regulatory context is clear, we need to have a land use policy and plan which maps the whole country and indicates what areas can be categorised as *jus privatum* and which ones should be *jus publicum*.

The location of the trusteeship over both and the terms of the trust are critical to the success of such a move. In practical terms, it would entail recognition of private, community and public rights as subordinate to the national interest. Allodial title would be in a polity above the diverse holders and clear terms and conditions of grant should be devised which do not strip the allodial holder of the right to take back the land in the greater public interest subject to compensating the rights' holders. This would support the view that:

The deep structure of property is not absolute, autonomous and oppositional. It is instead delimited by a strong sense of community-directed obligation, and is rooted in a contextual network of mutual constraint and social accommodation mediated by the agencies of the state.⁴⁷

The challenge is the identification of a policy that the citizenry trusts, given their mistrust of the state due to past illegal and irregular allocation of public land and the absence of accountability in dealing with trust land. This is the challenge in putting together a National Land Commission.

Currently, eminent domain (compulsory acquisition) and development control are manifestations of the concept of public trusteeship which facilitate the regulation of property rights. The concept of eminent domain is derived from the Roman *dominium eminens*, which refers to sovereignty over territory.⁴⁸ It refers to the right of the State by dint of sovereignty to take private property for public purposes. It flows from the fact that the State has radical title over all land in the territory and can, therefore, compulsorily acquire any part of it. The uses for which land has been traditionally acquired include defence, highways, hospitals and education.⁴⁹ In Kenya, the power to compulsorily acquire land is provided for under sections 75,⁵⁰ 117 and 118⁵¹ of the Constitution. It must be shown that the land will promote the public benefit, such benefit being weighed against the hardship that the acquisition will cause for the owner and prompt compensation must be paid for the acquisition.

47 Kevin Gray and Susan Francis Gray, 'The Idea of Property in Law', in *Land Law: Themes and Perspectives* (15 ed) by John Dewar and Susan Bright (Oxford: Oxford University Press, 1998).

48 Bondi D Ogolla and John Mugabe, 'Land Tenure Systems and Natural Resource Management', in *Land We Trust: Environment, Private Property and Constitutional Change* (85 ed) by Calestous Juma and Jackton B Ojwang (Nairobi: Initiatives Publishers, 1996) page 107.

49 Bondi D Ogolla and John Mugabe page 107.

50 This section deals with compulsory acquisition generally, and the legal framework, therefore, is laid out in the Land Acquisition Act..

51 These deal with 'setting apart' of trust land by county councils or the Commissioner of Lands, and the legal framework for this is laid out in the Trust Land Act.

Police power refers to the power of the State to regulate land use in the public interest whose earliest manifestations included the right of the State to tax its citizens, 'taking' of property for necessities of war and the regulation of the use of or destruction of land in the event of pestilence, thus interfering with private property.⁵² Not surprisingly, it has been argued that the rights, powers, privileges and immunities of the right holder are determined by the scope of police power and that there is no such thing as absolute proprietorship.⁵³ It is provided for in a number of statutes, such as the Public Health Act, the Agriculture Act, the Local Government Act, the Physical Planning Act and the Water Act.

While eminent domain and police power have not been effective in securing the public trust over land, the draft National Land Policy proposes to revamp the powers by ensuring that all land is held 'on terms that are clearly subordinate to the doctrines of compulsory acquisition and development control'. The Policy also proposes that the 'exercise of these powers should be based on rationalized land use plans and agreed upon public needs established through democratic processes'. Moreover, it also proposes that 'the radical title shall be vested in the people of Kenya collectively as a nation, as communities and as individuals' and that 'Kenyans both as communities and as individuals can draw tenure rights from that radical title under specific laws'.

V. CONCLUSION AND WAY FORWARD

The land question(s) in Kenya require a bold and radical departure from past practice which has been deferential to property rights, however acquired, and neglected the grievances that people have over land. The proposals in the draft National Land Policy provide a framework for reconfiguring land relations in Kenya. The process is likely to be contested by the beneficiaries of the current system. However, if we consider that property is a social relationship, the failure by the property holders to get the acceptance of non-property holders of the legitimacy of their rights will demean the quantum of the property rights. Legality will not be enough to guarantee enjoyment of property and this will raise the costs of maintaining the property.

The frequent land clashes and the inability of some displaced persons to repossess their land after land clashes is a clarion call to Kenyans to deal with the land question before it becomes unmanageable. Dealing with this question is not as

52 Ogolla and Mugabe, pages 108-109.

53 Ogolla and Mugabe, page 109.

much a matter of doing what is legal as of doing the right thing in the circumstances. Legality must be tempered with ethics, equity and fairness.

LANDHOLDING AND ETHICS: CRITICAL ISSUES FOR KENYA'S RURAL ECONOMY

Tom M Konyimbih

SUMMARY

This paper reflects on the landholding structure in Kenya's agricultural areas in the context of the "land question," which is the subject of discussion in the draft national land policy, now awaiting parliamentary consideration.

Questions regarding access to land, ownership, administration, management and use have been at the centre of debate in Kenya since the colonial period. These issues have not been fully resolved even after Kenya's political Independence, now running into almost half a century.

Since the 1991 declaration of a multi-party political system, socio-political questions have fused with ethno-land conflicts heralding massive displacements of Kenyans from various locations in the country. The paper interrogates the existing and proposed landholding structures (ownership, administration, management and use).

It proposes the widening of the rights and interests in land through increased irrigation, credible leaseholds that separate ownership from use, greater use of land taxes for idle and under-utilized agricultural land to discourage such idle holding of land or the holding of fertile land for purely speculative purposes.

The paper also proposes the drawing of codes of ethics to supplement land legislations that will be formulated to implement the codified land policy. This aims to emphasize the importance of land as a socio-economic asset in this agricultural economy and will also enable greater transparency, accountability, conservation, social responsibility and prevention of conflicts between individuals, societies and the environment.

Whereas the law sets the minimum standards that individuals in society are expected to meet, ethics sets the highest, at times, idealistic obligations. Law and ethics should be complementary and are a way of moving forward in practically addressing the "land question" in Kenya.

I. INTRODUCTION

The issue of land settlement and the principle of territoriality has been key to the history of conquest and productivity all over the world.

In the pre-industrial revolution period in Europe, the levels of local and regional economic development was closely linked to the land tenure forms prevailing in those countries.

One of the most debated issues in both pre-independence and postcolonial Kenya has been the issue of landholding, its access, settlement, ownership, administration and use.

During the colonial period, all the land and agricultural policies were aimed at favouring European settler export production¹.

At Independence, there was a fundamental shift away from the predominance of large plantations towards smallholdings (obtained through re-settlement schemes, co-operatives and land-buying companies) and the registration of adjudicated customary trust lands in the former native reserves.

In and of themselves, these approaches have neither been far-reaching nor have they achieved the expected results earlier hoped for by the rural development planners. This is not, however, to overlook the benefits of the reforms wherever that has been recorded.

The 1964-1970 National Development Plan and the 1963 KANU (revised) manifesto both called for a transition from a subsistence to a monetized economy based on a balanced rapid growth and modernized agriculture and hinged on social justice, human dignity, and economic welfare².

The sessional paper number 10 of 1965 (page 5) had indeed termed as anti social behaviour the keeping of land as idle and undeveloped when the nation needs to rid itself of food shortages, disease, ignorance and poverty to ensure human dignity and social justice³.

Nearly fifty years after Independence, with a rapidly increasing population and lack of off-farm incomes, the land questions (landlessness, land concentration, unde- utilization, idle land and land mis-use) have reared their ugly head again.

1 Judith Heyer, Pepe Roberts and Gavin Williams (eds) *"Rural Development in Tropical Africa"* (Macmillan London 1981)

2 Sessional Paper no. 10 of 1965 on *African Socialism and its application to planning in Kenya*.

3 *Supra* note 2

II. KENYA'S LAND AND RURAL ECONOMY

Kenya's Facts and Figures Handbook, 2007⁴ provides the size of water masses as 11,230 square kilometers, National Parks as 25,334 square kilometers and other land as 546,086 square kilometre,s to make a total of 582,646 square kilometers.

Of the 546,086 square kilometers of dry land, because of increasing desertification over the last twenty years, only 16%⁵ is now categorized as medium to high potential (instead of the former 18%) with the arid and semi arid lands (ASAL) now taking 84%. These ASAL areas house 25% of Kenya's population (approximately 9.3 million people) and 50% of the livestock population (approximately 30 million assorted livestock)⁶.

Agriculture accounts (in year 2008) for 24% of Kenya's Gross Domestic product, 65% of the country's total exports and 18 percent of total formal employment.

A year before Independence, in 1962, agriculture and livestock production comprised 39 per cent of the Gross Domestic Product and 89 per cent of all the country's export earnings. The relative importance of the agricultural export sector has gone down but the subsistence rural sector is supporting well over three quarters of the national population.

The poverty-reduction strategies are dependent on an efficient and growing agricultural sector to provide food for the population and exportable surplus and raw materials for the agro industries. This is in line with the United Nations (UN) Millennium goals of ensuring food security, increasing smallholder incomes and the raising of general rural productivity.

All the subsequent national development plans have stressed the importance of efficient, sustainable and equitable use of land for the common good, for poverty reduction, social harmony and to keep the largest number of people in gainful activity to reduce unemployment.

4 Facts and Figures Hand book (Nairobi: Central Bureau of Statistics, 2007).

5 Data from the Ministry of Agriculture, 2007. "Vision 2030" main report page 42.

6 The Ministry of Agriculture's strategy for revitalizing agriculture (2004-2014) provides an approximate figure of 60 million livestock as at 2004 (29 million chicken, 10 million beef cattle, 3 million dairy cattle, 9 million goats, 7 million sheep, 800,000 camels, 520,000 donkeys, and 300,000 pigs). Sedentary livestock farmers keep indigenous, exotic and cross-breeds while nomadic pastoralists mostly keep indigenous breeds.

Part of the programme is to bring in more land under intensive agricultural production through irrigation schemes, diversify crops grown, support extension services, and credit and marketing schemes.

At the moment, the agricultural export sector is driven by the horticultural crops (cut flowers, fruits, spices and vegetables).

In the medium to high potential areas in Kenya where rainfall exceeds 1000mm per year, land for rainfed agricultural production is grossly underutilized with only 31 per cent of the land being put to good use representing a mere 5 per cent of all the land in the country.

Although smallholdings account for 77%⁷ of the total marketed agricultural output countrywide, they use only 60% of their crop land for agricultural production. The rest largely lies idle or is grossly underutilized.

The ASAL areas (84% of the physical geographical area of Kenya) have large areas that could be irrigated for crop production (9.2 million hectares) which in fact is the same area as the whole of the medium to high potential portion of the country.

Nationally, out of 540,000 hectares of irrigable land, less than 90,000 hectares are presently under irrigation. The irrigation sector still faces a number of structural and institutional constraints⁸.

A survey conducted in 2006 by the Central Bureau of Statistics (CBS) on uncultivated land with potential for additional crop development revealed that approximately 1 million hectares (2.4711 million acres) could be put to crop production, with the biggest chunks being in Rift Valley and Coast Provinces followed by Central, Nyanza, Western and Eastern provinces⁹.

The Agriculture Act (Chapter 318) Laws of Kenya provides for the promotion and maintenance of a stable agriculture, conservation of soil fertility and stimulation of the development of agricultural land within the accepted norms of good land management and good crop and animal husbandry. Sections 51 and 64 give the Minister for Agriculture powers to make land preservation and development orders. Specifically, part XII of the Act lays down rules for the preservation, utilization and development of agricultural land. These are provided for in sections

7 Statistical Abstract (Nairobi: Central Bureau of Statistics, 2007)

8 Strategy for revitalizing Agriculture 2004–2014 (Minister of Agriculture) on page 8.

9 Vision 2030: Transforming National Development (Ministry of Planning and National Development Government of Kenya 2007)

184, 186 and 187 of the Act. There is no evidence since Kenya's Independence that any Minister for Agriculture has ever invoked the provisions any of the aforementioned sections¹⁰.

III. ACCESS TO LAND, OWNERSHIP AND RURAL IMPROVEMENT

The rules of access to land, ownership and use are crucial to policies of local and national agricultural improvement.

Land administrators, managers, owners and users need to be clear about the institutional arrangements, social conventions and rights-systems-to-land and other natural resources in their areas if their programmes and interventions are to be successful on a sustainable basis.

It is often stated that secure land tenure arrangements are a prerequisite to increased rural productivity through investment in longterm activities and the seeking of mortgageable credit, thus opening up opportunities for increased rural investments.

Three landholding structures have been statutorily and constitutionally created and recognized since Kenya's political independence in 1963. These are private land, government land and trust lands.

- (a) Private lands. These are broadly divided into freeholds and leaseholds
 - (i) Freeholds (absolute proprietorships) obtained mainly after adjudication, demarcation, consolidation (if at all) and registration of customary (Trust) land and protected by section 75 of the (1963) Constitution. One can also buy, inherit or receive freehold land as a gift.
 - (ii) Leaseholds – are created out of private freeholds or, out of public land (i.e. private land leases and public land leases)¹¹.
- (b) Trust lands – are unregistered customary lands vested by section 115 of the (1963) constitution and the Trust land Act (Chapter 288) in the local County Councils.
- (c) Government land – Mainly land administered by the Commissioner of Lands¹² on behalf of the President of Kenya¹³ whether under public developments, buildings, farms, water or forests or whether it is unalienated, that is, the commissioner of

10 Agriculture Act Parts XII and XIII of the Chapter 318 of the Laws of Kenya.

11 Sections 40–45 of the Registration of Titles Act, Chapter 281 and sections 45–64 of the Registered Land Act Chapter 300 and section 20 of the Government Lands Act Chapter 280, Laws of Kenya.

12 Commissioner of Lands is a public officer whose office is created under sections 5 of Chapter 280 and section 5, Chapter 281 of the laws of Kenya to administer all Government lands in the country and to issue titles to all other lands, private or public.

13 Section 3 of the Government Lands Act Chapter 280 of the Laws of Kenya.

lands has not issued any letter of allotment. These are lands used or meant to be used for public purposes.

The 2006 draft Land Policy has also divided land in Kenya into three categories of private land (mainly freeholds and leaseholds), community land and public land.

The proposed new Constitution (Bomas Draft) in its chapter 7, covering “land and property” preambles that land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. It provides the designation of land as public, community and private.

This mixed ownership and tenure structure had been encouraged both by the Kanu (1963) Manifesto, the (1963) Constitution, the Sessional paper number 10 of 1965 on “*African Socialism and its Application to Planning in Kenya*”, the first and subsequent national development plans, all the sessional and sectoral papers and the various Acts of Parliament.

IV. LANDHOLDING AND THE “LAND DEBATE”

Landholding structures in the form of tenure systems determine who can hold, control, administer, manage, transfer or use what land-based resources, to what extent, for how long and under what circumstances. Therefore, landholding patterns are important components of social, political and economic structures of any country, whether codified as formal law, or, as customary law.

In mixed economies, both formal and informal tenurial arrangements will be affected by:

- (a) Overriding landholding rights– as for instance, when a governmental body enjoys the radical title to land, to plan, allocate or re-allocate it, etc;
- (b) Overlapping landholding rights –denoting the “bundle of rights” principle when several interests exist on the same land at the same time (freeholds, leaseholds, sublease holds, easements, encumbrances, etc);
- (c) Complementary landholding –when various parties share the same tenancy in common or jointly in the same parcel of land;
- (d) Competing landholding interests–when the same parcel of land is a subject of competing claims by different parties. This often leads to serious grievances and land disputes. It may originate from problems in defining land rights, administering land rights or from any historical injustices.

In most land policy documents, the objectives have usually been stated as (a) to enhance efficiency and maximal productivity (b) to ensure distributional equity (or equitability in land holding) (c) to ensure environmental sustainability (or conservation) and, to permit and encourage globalization.

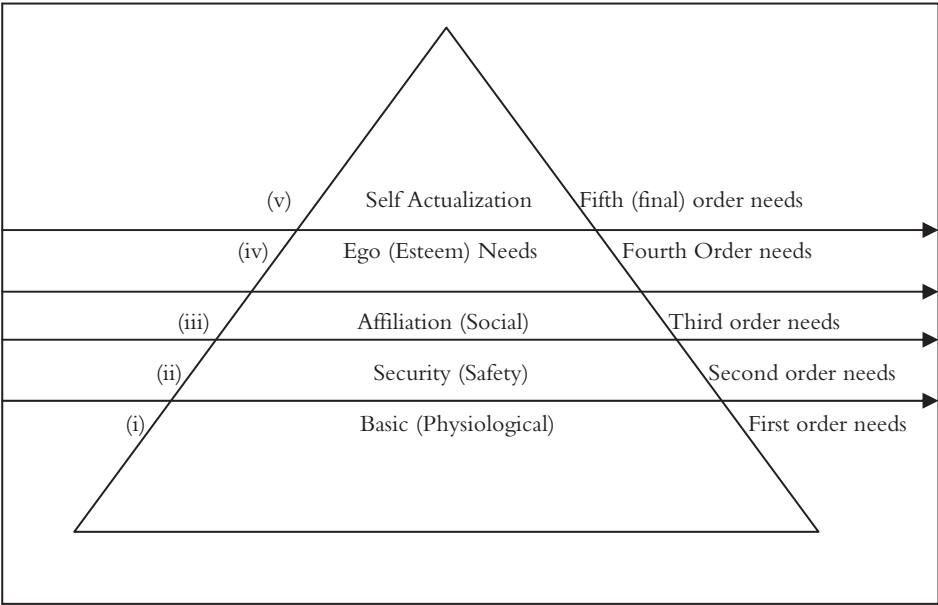
Each of the criteria above is important for a mixed democratizing economy such as that of Kenya but the difficulty arises in ensuring a credible and optimal balance between them at any one time.

The fact that land should be used efficiently to produce food, raw materials and housing for the country is almost universally accepted as priority number one.

In Abraham Maslow’s hierarchy of needs (Physiological (basic/survival) needs, safety (security) needs, social (affiliation) needs, esteem (ego) needs, self realization (actualization) needs)¹⁴, these criteria have always been listed as such.

In rural agricultural communities, the first three types of needs have to be fulfilled in that order by the landholding system. Food, security (economic, physical/settlement and social) and affiliation (social) needs which ensure some level of belonging and social acceptance have a strong bearing on the socio-economic priority of the people in those areas.

ABRAHAM MASLOW’S PYRAMID (HIERARCHY) OF NEEDS



Source: Compiled from Rituparna, R (2007) and Banerjee, RP (2005)

14 See books on management under the topic of “Leadership and Work Motivation”.

Distributional equity in landholding is aimed at putting the basic means of production and livelihood into as many hands as possible. Politically, this is always an attractive proposition because it is quite often viewed as a political destination.

Over the last twenty years, the last two land policy criteria, that is, environmental sustainability/conservation and globalization have gained particular prominence because of global warming, desertification, population increase and international trade protocols. The current draft national land policy reflects all these four basics of policy components.

Development planners in Kenya in the pre-Independence and the post-Independence periods always extolled the virtues of private property in land but recognized also the part played by government and the community control of this basic resource.

Landholding structures can never be divorced from the type of society that development planners want to construct. The debate all over the world as to the appropriate nature of landholding has been going on for more than two thousand years.

The “patron saint” of moral philosophy, Socrates, was concerned with societal obedience to the law of reasoning and not its emotions, anticipation or feelings. He noted that human reasoning should lead to what is morally right as opposed to what is wrong so that (i) we ought never to harm anyone, (ii) we ought to keep our promises, and (iii) we ought to obey our parents and teachers.

Plato, an Athenian Greek (429–347 BC)¹⁵ born of aristocratic parents and growing up during the Peloponnesian war centering on the Greek great cities of Sparta and Athens, studied philosophy instead of politics as a follower of Socrates (executed for irreligion in 399 BC).

Plato saw a society divided basically into two; that of greater men (guardians) and that of lesser men. In his Republic he wanted common title to land for the guardians and private title to land for the lesser men whose task it was to work the land for the benefit of the former who were fated to live a luxurious life.

Aristotle, the Macedonian Greek (384–322 BC)¹⁶ and son of a physician father, Nicomachus, was a keen disciple of Plato. He studied and taught at Plato’s Academy for twenty years, later leaving to start his own Lyceum school in Athens.

15 Plato, *The Republic* (Hertfordshire: Wordsworth, 1997).

16 Aristotle: *The Nicomachean Ethics* (Hertfordshire: Wordsworth, 1996).

Aristotle was of the opinion that there should be, on the one hand, commonly owned land tilled by commonly owned slaves and on the other, privately owned land belonging to free citizens and tilled by privately owned slaves.

Whereas the Greeks were famous for philosophical thought, the Romans were famous for codified law. Seneca and Cicero in their time held the Roman thought about land, the former believing that people were born equal and this should be reflected in common ownership of land. Cicero wanted land to be divided into two portions to be owned privately and publicly.

To some Western thinkers, private ownership of land was theft. For instance, Karl Marx saw sharp class distinctions during the European industrial revolution, with the consequent mass landlessness, following the period of feudalism and warned against private ownership of land.

In the United States, Marx had an avid supporter in the social reformer, Henry George (1839-1897), who, writing about the injustice of private property in land, stated that human beings should only be entitled to, as private property, that on which they have used the exertion of their labour to create, and that nature knows no distinction between master and slave, king or subject., saint or sinner.

That all human beings stand on an equal footing with equal rights including equal rights to land. If labour has been used to improve the land then one is entitled only to the value of that labour.¹⁷

The recognition of private property in land is therefore unjust and that which is unjust cannot be right. Nature could not allow that which it cannot cater for, and cater for in terms of the availability of land like the availability of air. This is why Henry George disapproved of the Malthusian "population –subsistence" trap so vehemently and so totally.¹⁸

John Stuart Mill in his book on *Principles of Political Economy* Book I, chapter XIII section 2 echoed the same sentiments as Thomas Mathus.

However, supporters of private property in land did not run short in supply, especially in the British Isles.

The Glasgow and Oxford educated Adam Smith (1723-1790) is commonly known as the father of the capitalistic liberal market economy as it is known today. In his second and more famous book, the "*Wealth of Nations*" published in 1776 he

17 Henry George, *Progress and Poverty* (USA, Schalkenback Foundation, 1879).

18 (see page 140 of his book "*Progress and Poverty*").

vigorously advocates for private ownership of the means of production and the productive pursuit of self interest that finally leads to social progress.

Smith was, however, aware of, and cautioned against, unmitigated acquisition of land by individuals.¹⁹

Unequal distribution of land and income is not necessarily the preserve of liberal free enterprise societies although this is where it is most common and most pervasive. It quite often breeds unequal political power with concomitant economic advantages.

Other authors see private property as the very basis of human freedom, human prosperity, civic virtue and a crucial component of the liberal market economy.²⁰

The utilitarians argue that the lure of profit for individual owners always leads to innovation so that even if common profit is categorized as greed, it is then the duty of the well-meaning government to protect privately-owned property, tax the profits and income, provide public goods, conserve the environment and correct externalities –thus moderating gross inequalities that hard work, good luck, cunning, corruption, skill and innovation tend to throw forth to society from time to time.

John Stuart Mill (1806–1873) was a great supporter of the utilitarian school who saw the numbing effect of common ownership of land on the mind of the individual citizen. He noted that the focus should be on the individual owner/producer acting right to produce the most good for the greatest number of people. This good, for JS Mill, was measured mainly by the level of human happiness.²¹

Harvey M Jacob (2004) in writing about private property in the 21st century and the future of an American ideal noted that private property holdings will continue to be part of the American ideal but in a strictly modified form, different from that of the last century.

Given the challenges of private landholding, is public holding of land inevitable, or even desirable in a market economy? Was Karl Marx right in his “Das Capital” by suggesting that Capitalism would evolve into Marxian Socialism – away from government by the few, sharp class distinctions, unfettered land rights,

19 Adam Smith, *The Wealth of Nations* (New York: Bantom Dell Press, reprint 2003). Book II Chapter 3.

20 John Douglas Bishop (ed), *Ethics and Capitalism* (University of Toronto Press, 2000).

21 John Stuart Mill, *Principles of Political Economy* (Boston, USA: Little and Brown, 1848).

subsistence living standards for the majority, and exploitation of the masses by a favoured proletariat?

Denman (1969) records of the England of 1874 that 41.2% of all the land there was owned by only 0.2 percent of the proprietors comprising 1688 peers.

This state of affairs persuaded a number of the English people led by Joseph Hyder to present their case for massive land nationalization as an interim measure to address the mal-distribution of land in England.

Those who opposed this idea, including the legislators, saw a possibility of social unrest and disaffection resulting from such a programme and it was not carried through.

In discussing three decades of agricultural development policies in mainland Tanzania in the period after land was nationalized and crop-production directed to the peasants, Andrew Coulson (1981) noted that "it was wrong for the government to think that it could produce groundnuts by mechanization; wrong in making the farmers construct bench terraces to protect the soil in the Ulugurus; wrong to spend so much time fighting inter-cropping; wrong to encourage the uncontrolled registration of co-operatives after independence; wrong in planning to suppress the Ruvuma Development Association in 1969; wrong to rush through villagisation without some counting of the cost in terms of production."²²

For those who advocate public or common ownership of land, there are always the lingering questions:-

- (a) If government land is public land, can the hands of the public hold land? If yes, to what extent and to what ends?
- (b) Can it be considered that the part of the nation's land held as public land be considered as nationalized land?
- (c) Would the government be considered as a monopolistic landlord of this public land?

Is it not the clerk in the Land Commissioner's office, using archaic wide discretion clauses in an inappropriate (received English) statute, supervised by one or two human officials (all prone to the follies of misinterpretation, delays, misconceptions, biases and personal interests) who are the ones holding that total state landholding power in its absolute? What other personality does the state or government have to merit its landholding on behalf of the public?

22 Judith Heyer, Pepe Roberts and Gavin Williams (eds) "Rural Development in Tropical Africa" (Macmillan London 1981) (pages 52-89).

One theory, stressing the “instrumentalist” approach, views the government as an instrument of the ruling class focusing mainly, or even only, on the power elite whose main pre-occupation is the perpetuation of its dominant class position. This position may assume different forms and styles at various times making it uneven. Such unevenness will define the roles and limits of the government in conceptualizing, formulating and implementing a set of land reforms aimed at solving uneven accumulation at the central class level. In so doing, another set of contradictions may be re-created in line with the capitalist mode of production.

Capitalist economies develop in an uneven and combined way. Uneven because development hardly follows a smooth, straight continuous path. It is combined because of the massive scale countrywide, with parts related organically and dialectically. Expansion and contraction mark the paths of individual and mass accumulation with development-creating externalities which in turn create barriers to new development.

Growth and stagnation then comprise the joint outcome of accumulation and squalor on a regional and national scale. The non-linear path to individual progress through capitalist innovation and competition leads to social, economic and political differentiation with inter and intra-class competition in the appropriation of labour and economic surplus. There are thus the crisis of accumulation at the economic (productive) level and the crisis of legitimization at the electoral (political) level which enhance class struggle at various times thus undermining and reinforcing the capitalist mode of production over time and space. For the majority in the rural areas, the smallholders, their relation with capital (credit, extension, profit, marketing, inputs etc) and the capitalist state is crucial to the understanding of their mode of production. Export commodity producers are fully expropriated by the state enclaves while the subsistence producers are only partially captured because they are not fully separated from their means of production. At the economic and political level, the state appears as a social relation that is both the object and the instrument of class conflicts. Economic actors strive to sustain accumulation in spite of systematic constraints while political actors strive to maintain class dominance in spite of class struggle. Each creates its own level of contradictions and there are inherent limits to the capacity of the state to manage such crisis due to its limited capacity (financial and administrative) and due to limits to its own legitimacy.

V. LAND REFORM AND THE "LAND QUESTION" IN KENYA

The dialectic of uneven development, both socio-economic, and political can be used to interpret the underlying nature and causes of the landholding crisis that Kenya has experienced before and after her political independence.

The colonial landholding structure was tethered on the capitalist large-farm economy with cheap labour commodity being extracted from the deliberately designed African "native reserves" and mediated by a cash or other consideration to pay the poll or hut tax. Over time and space, settlement "squeeze" and socio-political tension was the inevitable consequence. Later on, the land adjudication, demarcation and registration programme, by recognizing only the primary interests in land and ignoring the secondary rights²³ holders who cannot all be included in the land registers as rights landholders have enhanced socio-economic tensions rather than ameliorated the situation. Even for the registered proprietors, the benefits of registration reforms earlier anticipated by the development planners of the 1950s have largely not been realized²⁴. Then the settlement schemes started immediately before Kenya's political independence and continued, unevenly, to date have also not had the massive impact earlier anticipated. The schemes did not solve the problem of landholding and landlessness. Criteria of selection were skewed at best, and the low income high density settlers were left with huge loans to service from the outset.

Over the years, the inputs, loans, credit and extension programmes have supported only few large-scale farmers in various parts of Kenya's rural economy.

VI. WHAT, THEN, IS THIS "LAND QUESTION"?

The "land question" in Kenya revolves around the pre-Independence and post independence ideologies and practices, some of which had been debated and tried in capitalist Europe for many years. The meeting between indigenous tenure patterns and the requirements of the capitalist free-market liberal ideologies has not made the situation any better. It is shaped by social, economic, legal and political factors.

The continued dependence of the country on land-based resources means that issues about access, ownership, administration and land-use stand at the centre of the land question.

23 The doctrine of "trusteeship" included in the last part of section 28 of the Registered Land Act (Chapter 300) has never been interpreted widely to include all secondary rights holders.

24 1954 Swynnerton Plan.

The African political elites inherited at Independence and continued the legal, administrative and colonial economic structure and the capitalist social relations.

In the 1960s and early 1970s commodity production increased in almost all sectors of the country's economy because more people were able to access rights in land and to take advantage of the new favourable tenure structures hitherto enjoyed only by the European settlers.

Over the years productivity in every sector has fallen, leading to a reduction in the agricultural sector's contribution to the Gross Domestic Product (GDP).

The manifestation of the "land question" in Kenya presently includes:

(a) Private landholdings

Landlessness in the smallholdings sector due to rapid increases in population and also due to the traditional inheritance rules. Registered proprietors are largely different from physical occupiers.

- (i) Declining land quality and productivity due to poor land use practices.
- (ii) Disinheritance of women and other vulnerable groups in society
- (iii) Overlapping, unrecorded land rights due to customary tenure rules. In the large farm sector, the major problems are:
- (iv) Underutilization of land with unproductive speculative holdings being common
- (v) Persistence of squatters
- (vi) Unplanned and inadequate environmental control measures
- (vii) Costly land transactions
- (viii) Bureaucratic land transfers due to innumerable legal stipulations and outdated records.

(b) Public/Government landholdings:

- (i) Land grabbing due to corrupt and illegal allocations
- (ii) Unsurveyed and unplanned government land all over the country
- (iii) Extra legal and bureaucratic land administration procedures
- (iv) Squatter settlements on government land
- (v) Over-concentration of administrative and land management machinery at the Nairobi headquarters
- (vi) Inefficient district and provincial land information records management systems leading to out-of-date records.

- (vii) Encroachment upon government land (forests, water fronts, wetlands, game reserves etc)
- (c) Trust lands (common holdings)
 - (i) Slow process of adjudication and registration of individual holdings
 - (ii) Unrecorded fragmentation and sub-divisions under customary rules
 - (iii) Deterioration of land quality thus reducing productivity
 - (iv) Lack of planning and use of land collateral even where possible
 - (v) Misuse of section 53 of the Trust Land Act (Chapter 288) giving the Commissioner of Lands powers to administer trust land on behalf of the County Councils.
 - (vi) Deterioration in land quality due to lack of conservation and environmental management.
 - (vii) Population pressure leading to encroachment on arid and semi-arid zones.
 - (viii) Arbitrary powers of eminent domain (setting apart) by governmental bodies.
- (d) Settlement schemes

These were part of the Independence bargain started a few years before Kenya's Independence to effect land redistribution for the landless and for squatters in various parts of the country and executed by the settlement Fund Trustees. There are high-income low-density settlement schemes and low income high density schemes. The land issues in these areas are to do with:

- (i) Increasing population claim against fixed holdings
- (ii) A lot of state resources directed towards high-income, low-density schemes.
- (iii) Ethnic animosity fuelled by political differences especially every five years' at election time.

Implementers of the land re-settlement programme did not foresee, or care, that after political independence the settlement land would be reclaimed by the original communities, and that during peak political campaigns every five years some political activists would base their campaign agenda on precisely the same issue, thus stirring ethnic animosity leading to land clashes that have disturbed this country since the advent of multiparty politics in 1991.

VII. WIDENING THE LANDHOLDING FRONTIER

Two important issues immediately confront land development planners in Kenya. One is the increasing population against a reducing size of arable land, and the

other is the underutilization of such arable land (at times such land lies completely idle).

There are three important ways of increasing the frontier of arable land in Kenya as follows:

- (i) Bringing more dry land under irrigation
- (ii) Creating effective but flexible leasehold (secondary) tenure in agricultural areas²⁵.
- (iii) Taxing idle and under-utilized land and using the proceeds to buy land in the open market for planning and re-distribution

VIII. IRRIGATION

Kenya imports staple foods like rice, maize, wheat and sugar because of her inability to produce the same due to unreliable rainfall in most seasons. This has put the country into a near permanent food deficit situation due to incessant crop failures.

Only 20% of the potentially irrigable land in Kenya is currently under irrigation (109, 350 Ha, instead of 540,00Ha) country-wide in the medium to high potential areas.

In the arid and semi-arid (ASAL) areas which now comprise 84% of the national total land area (48.4 million Ha out of a national total of 57.6 million Ha), even if only 13% (1.2 million Ha out of a potential of 9.2 million Ha) is put to productive irrigation, agricultural production in these areas would increase substantially. Approximately 19% of the total ASAL land could be irrigated. Committed governmental policies and actions for low-cost water capture and distribution procedures are needed coupled with increased access to markets for both individual and government controlled irrigation products.

IX. AGRICULTURAL LEASEHOLDS

The development of a flexible but effective leasehold system in the agricultural areas in Kenya will serve to separate land ownership from land use and thus widen the frontier of ownership of land through this secondary proprietorship. This will be useful especially where the owner is unable or incapable of parting with his/her land for productive use. There is widespread use of agricultural land-leasing in Asian countries and Latin America and small-scale informal arrangements in Africa.

²⁵ National Development Plan 2002-2008: Effective Management for Sustainable Economic Growth and Poverty Reduction, (Government of Kenya, 2001).

Within the ambit of planning and environmental conservation, flexible agricultural land leasing can be made to work in Kenya. There is already a legal framework in place (sections 40-45 of the Land Titles Act Chapter 281 and sections 45-65 of the Registered land Act Chapter 300).

Leasing arrangements are a tripartite relationship between the landowners, the tenants and the government. The government creates an appropriate and reliable framework within which the landowner-tenant relationship can work and thrive.

Over-regulation of leases takes away the landlord's power of manoeuvre while under-regulation and informality does not usually protect the tenant's interest.

Landowners need to feel safe and secure that tenants will not displace them from their holdings whereas tenants must also be protected against arbitrary evictions by landlords and their agents.

Sections 53 and 54 of the Registered Land Act Cap. 300 of the Laws of Kenya provide for the agreements implied in leases on the part of both lessors and lessees (landlords and tenants).

The general elements in most useful agricultural land leases are: names and addresses of landowners and tenants; starting and ending date of the lease; brief locational description of the landholding; landowners' and tenants' access rights during the lease; responsibilities of each party for repair and maintenance; the rent or consideration and when and to whom it is payable, compensation for breach, rights; notices, reliefs on forfeiture, future leases, agreements and sub leases and other encumbrances; conflict resolution mechanisms; registration and determination of leases.

A lease, however well structured and however comprehensive, operates only within a legal environment. The laws (statutes) are in turn dependent upon land policies aimed at making agricultural land available for greater production.

X. TAXING AGRICULTURAL LAND

Land taxation all over the world has a very long history. Presently, well over 131 countries have some form of tax or another on land. In Kenya, local authorities are legally mandated to tax land within their jurisdictions and to put the tax proceeds to infrastructural and services development.

Land can be taxed on the basis of its size, location, agricultural rent or unimproved site value upon approval by the minister for local government following an application by the local authority.

The following lands are taxable (rateable) under section 7(1) of the Valuation for Rating Act (Chapter 266) of the Laws of Kenya.

- (a) Registered freeholds or tenancies for life;
- (b) Registered private leaseholds for definite terms (from the Commissioner of Lands or local authority);
- (c) Lands where Land Titles Act (Chapter 282) applies, where, the person in possession is not registered but has claims and is in receipt of rents or profits;
- (d) Trustland where a County Council receives or would receive rent if land were leased;
- (e) Land leased from a local authority for 10 years and registered as such. Section 8 of Chapter 266 mandates a valuer to use the comparative method of valuation and to value the land as though it was freehold, without any encumbrances, and to seek an open market sale value subject to legal, environmental and planning regulations.

A number of rural local authorities have started taxing (rating) plantations in private hands and receiving contributions in lieu of rates in respect of gazetted lands under government forests, game reserves and other lands.

Land is visible, fixed, valuable and usually increases in value due to local and national planning (and investments) and is therefore a good object of taxation.

Putting a high rate of tax on idle or underutilized land will make landowners put their land to productive use. The greatest challenge to land taxation in Kenya has been the lack of proper plans, survey of land and poor maintenance of land records.

For a tax on land to succeed, records regarding landownership and land sizes must be known. Where large chunks of land have only scarce details regarding survey and planning, assessment for purposes of tax becomes difficult. Availability of these data would help speed up the programme.

In the 2008/2009 estimate of revenue of the government of Kenya for the year ending 30 June 2009 taxes on property are projected to total only 351 million out of a projected national income of Kshs 601 billion. This is less than 1% of the total. For both urban and rural land taxes, only an average of 22% of the tax potential is currently being realized.

XI. OF LANDHOLDING AND ETHICS

The failure of the communist/socialist land ownership regimes and the displacement, accumulation and social stratification caused by the capitalist free market system are a cause of concern for most governments.

Whereas the communist mode of production is now largely derelict, the developed capitalist countries have attempted to cushion their citizens against deprivation by having social benefits programmes.

In Kenya, the law needs to be supplemented with codes of ethics to ensure just, responsible, equitable and fair use of land.

The need for greater transparency, accountability, conservation, social responsibility and peaceful conflict resolution between individuals, communities and the environment has put ethical issues at the forefront more than ever before. Societies have been experiencing a moral re-awakening from the beginning of the 21st century with greater expectations from the liberated, literate populations after the fall of the Berlin Wall.

In both the professions and in their relations with the use and management of crucial resources, people are beginning to examine their actions not only in terms of what is just, and what is legal, but, more importantly, what is ethical.

The word ethics derives from the Greek word "*ethikos*" (moral) and "*ethos*" (character).

The pursuit of ethics is therefore the pursuit of moral character. However, ethics and morality define different angles. Ethics underlines "character" whereas morality reflects "behaviour".

Ethics and law are also different. Ethics sets the highest (at times idealistic) standards of conduct whereas the law sets the minimum level of conduct that a governmental system expects from an individual or group. Ethical codes can, however, be debated and turned into law from time to time.

What is ethical is that which is right, orderly, just and moral.

Ethical actions reflect actions and behaviour that are good for self and for society under the golden rule of "doing unto others as you would have others do unto you." This is probably a religious ethic derived from Mosaic law found in the book of Matthew, Chapter 7:12 that says that God "will judge you by the same rules that you apply to others".

The second most important Biblical commandment according to Jesus is "love your neighbour as you love yourself".

The love of God and the love of neighbour lie at the crux of prophetic and Christ's teachings. Being ethical is doing right for right's sake. Holding a parcel of land must be seen as equivalent to holding a position of public trust, with such a

trust not to meet just the minimum acceptable standards of the law, however well written, but to act in a way that also upholds the integrity, virtue and solidarity with the expectations of society.

The code of ethics and standards of practice of the American National Association of realtors provides that:

Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization.

This requirement imposes obligations on landholders (owners, administrators, managers and users) beyond the requirements of ordinary law or business.

The Islamic faith advocates the doctrine of brotherhood and virtuous lifestyles and the earning of one's wealth rightly and justly without exploiting society.²⁶

Gandhi sees the ownership of wealth in terms of the doctrine of trusteeship and provides that the seven (7) great social sins are:

- (a) Politics without principles
- (b) Education without character
- (c) Commerce without morality
- (d) Pleasure without conscience
- (e) Wealth without work
- (f) Science without humanity
- (g) Worship without sacrifice²⁷

In his book on the *"Practice of Management"*, Peter F Drucker (1954) commented that even the most private enterprise is an organ of society and serves a social function²⁸ This has been the basis of corporate social responsibility that is now practised by many private and public corporations.

Codes of ethics tend to use instructive, positive words instead of "warning of punishment" like statutes, do at times. They inspire and guide supportive thinking of those who intend to act justly, but they also act as a deterrent and a source material for instruction. They can also contribute to the public image of those for whom they are intended, if they adhere to them.

26 The Holy Koran XLIX:13.

27 Raj Rituparna, *Business Ethics* (Himalaya Publishing House, 2001).

28 Ramaprasad P Banerjee, *Ethics in Business and Management*.(Delhi: Hamlyn Publishing House, 2003).

In addition to having appropriate laws, there is need to formulate appropriate codes of ethics to guide private freehold landholding, lease holding, land use, governmental and local authority land administration and management.

There is, already, some foundation on which to build. Kenyans are already getting used to the pursuit of justice through anti-corruption legislation, human rights programmes, wealth declaration systems, sectoral codes of regulations (e.g. those of Public Procurement and Disposal Act, 2005 (section 139 of this Act provides that the Public Procurement Oversight Authority shall from time to time specify the codes of ethics to guide procurement and disposal), and the Public Officer and Ethics Act, 2003).

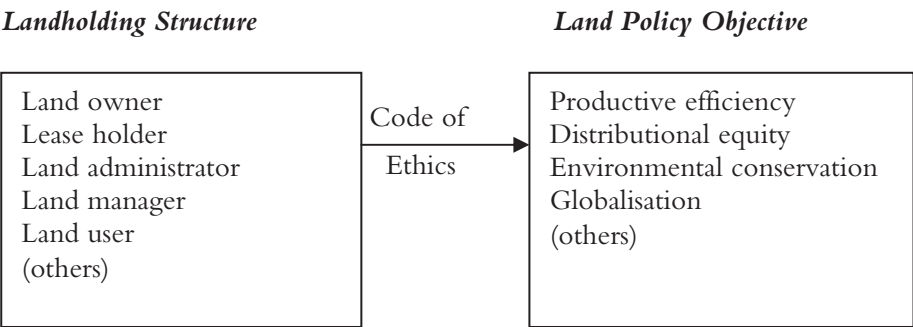
The main function of the codes of ethics is that they remind individuals about their obligations to society. Codes of ethics bring quickly to the fore (perhaps much more than the statutes do) the idea of rights and obligations. A right is something that is possessed unconditionally by everyone concerned as a legitimate inalienable moral claim because it underpins human dignity.

Rights provide guidelines that regulate the relationships between individuals and society (in terms of what they can expect from each other) and shared assumptions within uniformly understood limits. Codes of ethics are serious invitations to honour those rights and discharge certain obligations.

Rights and obligations, however, are at times set within certain limits of culture, values, traditions, etc. These should be recognized and reflected in the codes of ethics.

Each segment of the landholding structure can be linked to the basic principles and objectives of land policy by a code of ethics. For instance, land owners can be subjected to a code of ethics that directs their attention to the objectives of land policy of economic productivity, social equity, environmental sustainability and regional and global integration. Other (broad) categories of land holders can be guided by similar codes as depicted by the diagram below:

XII. ETHICAL RELATIONSHIPS IN LANDHOLDING AND LAND POLICY



XIII. CONCLUSIONS

The debates, ideologies and experiences of the country in terms of the structure of landholding (ownership, administration, management and use) in Kenya has had a similar pattern to those that have been observed internationally.

Skewed ownership patterns coupled with underutilisation of land have formed the main component of the “land question” in liberal market economies such as Kenya. The inevitable consequence is landlessness, unemployment and rural stratification. Opportunities exist for widening the landholding frontier by expanding land for irrigation and re-claiming those that have real potential for the same. Further opportunities can be created by having safe flexible leaseholds that will separate ownership from use, especially where the freeholder owners are unable to put their land to productive use.

Land taxation for agricultural areas (beyond a certain minimum threshold), especially for idle and underutilized parcels, can be implemented straightaway because the legal and technical expertise is in place, after survey and title registration on a national scale.

The draft national land policy will be implemented using new appropriate statutes. These statutes should be supplemented by a code of ethics to guide those who ordinarily deal with land about their cardinal responsibilities to society.

This will re-emphasize the basic importance of land as a crucial national resource that must be the subject of social responsibility and accountability for those who have the privilege of making decisions about it.

LAND TENURE ETHICS AND LAND VALUE TAXATION

JA Ainsley

I. INTRODUCTION

There seems to be a dilemma between following good ethics and implementing good economics; between supporting the rights of the marginalized poor and striving for economic progress. In Kenya, land has traditionally been viewed as a means of livelihood, whereas the modern view sees land as a commodity to be traded. The former is coupled with lower productivity than the latter, but the latter results in the economic exclusion of the poor. Three schools of thought are now grappling with this problem: the traditionalists, the free-enterprisers/developers and the ecologists/conservationists and their views are being aired regularly in the press. All this is taking place in the context of a nation under stress, since over a period of fifty years Kenya has failed to develop a sense of nationhood. This is due to the failure of the post-Independence governments to carry out effective policies promoting national unity.¹ Some have even said that Kenya is not a country, but a mere geographical boundary. The report on post-election violence tells us that it was not spontaneous; it was organized by local politicians.² But it would not have happened, without an underlying deep discontent with the inequitable state of society. The result is that some key policies emanating from the Central Government are no longer accepted by some regional groups. Recent events have shown for example that the “sanctity” of freehold land tenure is not accepted and cannot be protected by the State.

This paper will attempt to address this issue. Firstly I will outline the history of the land problem in Kenya and then worldwide. Then I will consider the nature of land tenure. Lastly I will suggest a practical solution to solve the problem: Land Value taxation. Also as an appendix I will briefly offer a critique of some articles in the Draft National Land Policy (DNLP).³

1 Edward Miguel, *‘Tribe or Nation? Nation-Building and Public Goods in Kenya versus Tanzania’* (Dept of Economics, University of California, Berkeley, December 2002) A paper downloaded from the Web. Correspondence: 508-1 Evans Hall, #3880, Department of Economics, University of California, Berkeley. CA [emiguel@econ.berkeley.edu].

2 Kenya National Commission on Human Rights, *‘On the Brink of the Precipice: A Human Rights Account of Kenya’s Post-2007 Election Violence’*, Key Findings, number 4, page 7.

3 Due to space constraints these appendixes have not been published in this volume. They are available at www.strathmore.edu/ethics.

II. HISTORY OF KENYA'S LAND PROBLEM

In pre-colonial times land ownership was collective or communal. This system viewed the living land owners as merely holding tenancies at will from the dead, as being merely trustees of the latter. This was all reinforced by religious belief. Lands occupied by a family were not demarcated because their limits were known and respected and possession was seldom disturbed as long as the occupation was effective. The community laid no claim on the produce of the soil other than the well-recognised right to hospitality or of assistance in times of scarcity.⁴ So, reasonable security of tenure existed for the cultivator. There was little disturbance of occupation when cultivation was well established. By contrast, landlord-tenant relations in other societies give rise to a lot more disturbance than the collective system did in Africa.⁵

As far as transactions in land were concerned, tribes frequently made arrangements to admit outsiders to their lands. Gifts of some kind were given on admission, but these transactions did not amount in any sense to sale of lands. They indicated rather the affiliation of the newcomers to the land-owning group, and as soon as a shortage began to be felt, the feeling that the land was the inalienable property of the group led to a reassertion by its members of their hereditary claims.⁶

There was also in some areas the custom of "pledging" land, which resembled a kind of mortgage. By this custom, the creditor had the use of the land until the debt was paid. If circumstances prevented redemption, then it would seem to amount to a sale, but with the coming of the European courts, the right of redemption was always insisted upon as a defense against the recognition of a sale, when transactions having all the appearance of complete transfers were brought before these courts. There is a Kikuyu proverb "A debt on land can never be finished."⁷ i.e. land can only be pledged and a pledge is always redeemable.⁸

The Europeans and colonialists did not understand the nature of the African commons. They thought they were not property systems, but merely *terra nullius* or *open access*. They thought that property must derive ultimately from a sovereign and that the community was not a legal person. But this is not so; the commons are not *res nullius* but rather *res communis*. They are not a kind of public property, but are

4 Lord Hailey, *An African Survey*, (Oxford: Oxford University Press, 1937) (page 833).

5 Lord Hailey, page 869.

6 Lord Hailey, page 835.

7 Lord Hailey, page 836.

8 Lord Hailey, page 864.

private property for the group that controls it. The individual members of the group have clear rights and duties as to how it is used. There are structures for decision-making about its use. So they are not open access systems, nor state or co-operative or socialist property.⁹

When the British came they expropriated the commons by a series of legal actions. English law was applied as the basis of civil administration. Land which had not been appropriated by a local chief or individual was declared *terra nullius* and automatically vested in the Crown. A new land administration process was put into effect which ignored established community principles. Indigenous communities were crammed into reserves often on the least productive land. Males were subjected to taxation so as to induce them to work on European farms, thereby depriving the reserves of valuable manpower. This disequilibrium led to land deterioration and poverty.¹⁰ This was a common feature in all the colonies where reservations were set up and was recognized at the time; “with few exceptions the carrying capacity of the soil for both human beings and animals is definitely on the down-grade; a state of affairs which, unless soon remedied will ... create an appalling problem of native poverty.”¹¹

Westerners then wrongly attributed this poverty to the “common property system” as an argument for pushing private tenure, when in fact it was due to the destruction of the local-level institutional arrangements whose purpose it was to keep resource uses sustainable. A present day example of community “policing” to maintain sustainability is that of Mukogodo Forest in Laikipia North District, home to 4,000 people.¹²

The idea that the commons are inferior is dominant among Western thinkers and the elite in Africa, as for example in the writings of Michael Norton-Griffiths.¹³

When the Colonial government realized that the Reserves system had failed, it decided to undertake something akin to what we now call “privatization”. So, in 1954 began the legal process¹⁴ of converting common property regimes into

9 Okoth-Ogendo, ‘*The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*’, *Programme for Land and Agrarian Studies*, School of Government, University of Western Cape 2002 (page 5).

10 Okoth-Ogendo, pages 6-7.

11 Lord Hailey, page 806.

12 Ndirangu, Mwangi, “*Where Residents Would Prefer Jail to Plundering their Forest*” *Daily Nation*, Wednesday 10 September 2008, page 28.

13 Norton-Griffiths Michael, ‘*Some Economic Characteristics of Land Tenure in the Agricultural areas of Kenya*’ June 2008, This is an e-paper found at <<http://mng5.com>>. Consulted in July 2008.

14 Ndungu, Paul N, Chairman, Commission of Inquiry into Illegal/Irregular Allocation of Public Land. (Nairobi: Government Printers, 2004) page 138.

individualized property as a way of “intensifying African agriculture.” (Swynnerton) It was only fractionally completed by the time of Independence. Some writers claim that the programme was a political manoeuvre to establish a middle class of landowners who would act as a buffer between the nationalists and the settler community.¹⁵

The conversion from communal to private ownership has been found to lead to over-capitalisation of land values, speculation, the accumulation of land in the hands of those who do not develop it and the penalization of newcomers by burdening them with undue overhead charges.¹⁶

With Independence there were no radical alterations to remedy the worsening situation of landlessness. Colonial policies and patterns of development continued. Instead an African state elite was formed which was able to entrench itself in the activities of the formal sector and the resources of the country were directed there, instead of solving the agrarian problem.¹⁷

After Independence although there was structural transformation there was also a continuation of colonial legal institutions. In colonial times, the European farmers had a lot of say in the running of their own affairs, but the Africans in the reserves were subjected to strict control. This continued after Independence with the Provincial Administration; any gathering for social, economic or political purposes was vetted. All this retarded development in the rural areas.

Later during Moi’s presidency there was a lot of misallocation of land in settlement schemes. Many who were landless in a locality would see members of other tribes being allocated land and this gave rise to simmering resentment.

This was the development of the problem in general. Particular details worthy of a brief mention are: the Coastal ten-mile strip problem where the entire population was dispossessed and became squatters on their own land, and the ethnic mixing that occurred in the farms of the white settlers which, in the elections of December 2007 as in previous elections, provided the tinder for political fire.

15 Okoth-Ogendo, HWO, “*Development and the Legal Process in Kenya: An Analysis of the Role of Law in Rural Development Administration*”, *International Journal of the Sociology of Law* 1984, Volumes 12, 59-63.

16 Lord Hailey, page 872.

17 Okoth-Ogendo, ‘*Development and the Legal Process in Kenya: An Analysis of the Role of Law in Rural Development Administration*’, *International Journal of the Sociology of Law*, (1984); Volumes 12, 59-83.

III. WORLD HISTORY OF THE LAND PROBLEM

The land troubles we see in Kenya are just a variation on a theme that has been played throughout history. In ancient Egypt all land belonged to the Pharaoh who leased it out to his political favourites. In Greece land had become so concentrated in the hands of a few that Aristotle (384–322 BC) said, “The whole of Attica was in the hands of a few and if cultivators did not pay their rents, they became subject to bondage.”¹⁸

Roman society developed as follows. Beginning as a small kingdom where each man had his own land, was the master of his own family and was proud to serve the King by taking up arms, it changed over the centuries into a great empire which had a system of “*latifundia*”. These were great landed estates with slaves working on them. By then the original farmer-soldier (*agricola*) no longer existed. The slaves had no interest in defending the Empire from external aggression when it went into decay. Even before the end, Tiberius Gracchus (died 133 BC) said, “the private soldiers fight and die to advance the wealth(y) and the luxury of the great, and they are called the masters of the world, while they have not a foot of ground in their possession.” And Pliny the Elder (23 – 79 AD) said, “Land monopoly ruined Rome.”¹⁹ Rome had the land laws of “*dominium*” – a legislation of property in land originally obtained by conquest and plunder.

Charles Avila in the Chapter “The Concept of Ownership” of his book states:

“The concentration of property in private hands began very early in Rome and was indeed based on the foundational and legitimizing idea of absolute and exclusive individual ownership in land. This was the same idea which would come to form the basis of the slave-owning, the feudal and the capitalist (including the pseudo-socialist, or state-capitalist) economic systems successively. Modern civilization has not yet discarded this antiquated ownership concept, which was derived from ancient Rome. In fact, it seems to us, this is one of the main roots of the present global crisis, in which the rich become richer because the poor become poorer.”²⁰

In the first three hundred years of its existence, Christianity flourished as a persecuted sect in the Roman Empire. The years of persecution ended with the

18 "The Constitution of Athens" by Aristotle, CHAP. II. "The Oligarchical Constitution", line 3, quoted by the "The Online Library of Liberty" <http://oll.libertyfund.org> based on an edition of Aristotle's Constitution of Athens, translated by Thomas J. Dymes (London: Seeley and Co., 1891).

19 The Geonomy Society. '101+ Famous Thinkers on Owning Earth' One of many online articles available at www.progress.org/geonomy/thinkers.html > consulted June 2008.

20 Avila, Charles, 'Ownership: Early Christian Teachings' (Maryknoll, Orbis Books, 1983) (page 8) – cited in Hartzok, Alanna. "Earth Rights Democracy: Public Finance based on Early Christian Teachings" Christianity and Human Rights Conference, Samford University, Birmingham, Alabama, November 2004 <www.earthrights.net/docs/samford.html> Consulted June 2008.

Edict of Milan issued around 313 by Emperor Constantine. When it was finally tolerated, it appeared in public overnight fully grown without any period of gestation. It had been growing all along, permeating every area of society, proving that it did not need State protection. Unfortunately, Emperor Theodosius I made it into the State religion in 380. It certainly did not need that but the bishops had no say in the matter. As a result of this and of the generous donations of land from nobles with the best intentions, the Church soon became one of the biggest landowners. This did not help it to recognize the validity of the ideas and support the pleas of some of its greatest thinkers for a better distribution of land. In his book Avila quotes some of the Fathers:

Ambrose: “How far, O ye rich, do you push your mad desires? Shall ye alone dwell upon the earth? Why do you cast out all the fellow sharers of nature and claim it all for yourselves? The earth was made in common for all. Why do you arrogate to yourselves exclusive right to the soil?”

St Gregory the Great (Pope from 590 – 604) rebuked the Romans when he said: “They wrongfully think they are innocent who claim for themselves the common gift of God.” And “The earth of which they are born is common to all and, therefore, the fruit that the earth brings forth belongs without distinction to all”.²¹

Clement of Alexandria: (on the functions of property) – “to be shared,” “to minister to” and serve “the welfare of all”; “not for personal advantage as being entirely one’s own” but “for those in need”; “to achieve *autarkeia*” and “to foster *koinonia*” – constitute the very essence of Clement’s view of property.*

St John Chryostom: “God in the beginning did not make one man rich and another poor; nor did he afterwards take and show to anyone treasures of gold, and deny to the others the right of searching for it; rather he left the earth free to all alike. Why then, if it is common, have you so many acres of land, while your neighbour has not a portion of it?”

Augustine: He (according to Avila’s research) saw that the poor are poor because they have been deprived by the propertied few of the wealth that should belong to all. He laid the blame for this unjust situation squarely on the doorstep of an absolutist and exclusivist legal right of private ownership. He reminded his audience that they were all “made from one mud” and sustained “on one earth” under the same natural conditions, having the same essence and called to the same

21 The Geonomy Society, number 17.

* *Autarkeia* – self-sufficiency, *koinonia* – the common good.

destiny. He rejected the legalized status quo as inappropriate for human living. Holding that legal arrangements of property rights were of human origin, he asserted that they should be changed, in theory and in practice, in function of a faith-informed ethic based on the true meaning of ownership.

Basil the Great: He saw that a privileged few were exceedingly rich, ostentatious, and powerful, in as much as wealth, particularly the wealth-producing resource, land, was concentrated in the hands of the few. He taught a philosophy of ownership based on the view that God was Father and Giver and Provider for all, and that therefore a few must cease stealing the food-producing resources that God had destined for the use of all.

Basil admits a certain right of labourers to the product of their labour but asks the landlords by what right they exercise ownership over their vast estates: "Which things, tell me, are yours? Whence have you brought them into being?" Whatever you have produced, or brought into being, may justly be yours. However, it is land that has made the landlords rich, and land is not something they have brought into being." Speaking to the rich Basil said:

"You are like one occupying a place in a theatre, who would prohibit others from entering, treating as one's own that which was designed for the common use of all ... If each one would take that which is sufficient for one's needs, leaving what is in excess to those in distress, no one would be rich, no one poor. Did you not come naked from the womb? Will you not return naked into the earth?"²²

After the collapse of the Roman Empire and the ensuing chaos, the feudal system appeared in 8th century Europe. At feudalism's height in England in 1215, the Magna Carta was agreed to by the King which guaranteed some civil and political liberation, but the right to land for the common people was not one of these rights. This was the beginning of the enclosure period which lasted from 1235 until the 17th century when the mass of peasants were evicted from their holdings and had their common lands fenced off for sheep rearing. The Statute of Merton, 1235, was the first one to enforce enclosures and spoke of the need to "extract more rent by improving the land." Rent was taken from the peasants. Being denied access to land, the majority of people were forced to become wage labourers. Thus labour became a tradable commodity. The enclosures caused land to become "private property" and hence converted it into a commodity.

During the Protestant Reformation the monasteries were dissolved and Church land confiscated. As a result the Church was no longer able to continue its program

22 Charles Avila, pages 134-5.

of helping the poor and thousands of them were thrown onto the streets. The Church lands did not go into the hands of the Crown; instead they ended up in the possession of the nobility and any rents which they would have produced never benefited the State.

There were many peasant revolts throughout Europe in these centuries, all of which were put down. A quotation of Robert Kett, 1549, leader of a peasant revolt in England, expresses the common sentiment:

“The common pastures left by our predecessors for our relief and our children are taken away. The lands which in the memory of our fathers were common, those are ditched and hedged in and made several; the pastures are enclosed, and we are shut out. Whatsoever, the fowls of the air or fishes of the water, and increase of the earth – all these do they devour, consume and swallow up ... We can no longer bear so much, so great and so cruel injury; neither can we with quiet minds behold so great covetousness, excess and pride of the nobility ... While we have the same form and the same condition of birth as them, why should they have a life so unlike ours, and differ so far from us in calling?”²³

Land enclosure had been condemned as a gigantic swindle on the part of the large landowners, and a well known rhyme by Oliver Goldsmith sums it up thus:

- (a) The law hangs the man and flogs the woman;
- (b) Who steals the goose from off the commons;
- (c) But turns the greater scoundrel loose;
- (d) Who steals the commons from the goose.

In St Thomas More's time (1478–1535), whole villages were being demolished to make way for the more profitable sheep rearing and families were turned out onto the roads to starve. Over the centuries millions of acres of land were enclosed. In 1086, more than half the arable land belonged to the villages, by 1876 only 2225 people owned around half the agricultural land in England and Wales.²⁴

Scotland had never been part of the Roman Empire and so feudalism arrived late there. It was introduced by David I (1084–1153). The nobles were granted charters over extensive estates in return for political, financial and military support.

23 Hartzok Alanna, “*Democracy, Earth Rights and the Next Economy*”, 21st Annual EF Schumacher Lectures, Amherst College, Massachusetts, 27 October 2001 [available at www.earthrights.net/docs/schumacher.html] Consulted June 2008].

24 Hartzok, Alanna, ‘*Democracy, Earth Rights and the Next Economy*’, 21st Annual EF Schumacher Lectures, Amherst College, Massachusetts, 27 October 2001 available at www.earthrights.net/docs/schumacher.html Consulted June 2008.

In the early stages this did not confer ownership of land, but gradually the nobles included ownership as part of the agreement. As feudalism developed the remaining lands of the Crown and the Church substantially disappeared by the end of the 16th century, absorbed by the landed aristocracy. They controlled parliament and embarked on law reform. The Law of Entail, 1685, was passed, preventing land from being lost when a landowner went bankrupt. In 1695, an Act was passed allowing the appropriation and division of millions of acres of common land. Even land belonging to towns was taken, some of them disappearing from the map in the process. In 19th century the Highland Clearances took place. Peasants were forced off the land and migrated into the slums of the industrial cities.²⁵ This explains why Scotland now has the most inequitable distribution in the world. With a land area of 19 million acres 97% is rural and 1/8th of that is owned by public bodies. Of the other 7/8 around 2/3 is owned by a mere 1252 people (0.025% of the population), i.e. they own 58% of the land area of Scotland.

In the Kingdom of the Two Sicilies (Sicily and the lower half of Italy) common land was widespread up to 1860. In 1860 Garibaldi and his Piedmontese forces invaded as part of their campaign to unite Italy. They introduced title deeds and private ownership. In a few years out of a population of about nine million, three million became landless. Most of them immigrated to America.²⁶

Ireland is probably the most tragic example of all. By virtue of the 1800 Act of Union, Ireland was incorporated into the United Kingdom and its parliament was dissolved. Protestants had political voice, Catholics had none. Irish goods were heavily taxed. Tenant farmers had to give their entire crops to landlords as rent. They subsisted on potatoes. When potato blight came and destroyed the crop threemillion died of starvation between 1845 and 1849. One million emigrated to America. The population dropped from eight million to four million. During the famine Ireland was exporting enough grain, cattle and pigs to “feed the nation twice over.”²⁷

In America, the philosophy that land can be appropriated came across the ocean with the first settlers. At the beginning there was plenty of land for European expansion (at the expense of the Indians). The Indians were pushed westwards, later into reserves, as their communal land was taken and privatized by the European settlers. In the Southern States there arose a situation where a few large

25 Wightman Andy, ‘*Scotland: Land and Power*’ (Edinburgh: Luath Press, 1999) pages 16 – 25.

26 Borroso, Silvano, A Sicilian – private communication [January 2008].

27 Ward Elizabeth, ‘*When Ireland was Europe’s Ethiopia*’, Scholastic Update, 15 December 1986 Cited in number 22 above.

landowners lived off the labour of many black slaves. The majority of whites were landless and quite poor with all the problems of poverty; young men turning to crime and young women to prostitution. Consequently, to this day they are still called “White Trash”. Paradoxically, the million black slaves were actually better off materially. After the Civil War, Thaddeus Stevens, a Congressman, wanted to confiscate and break up the large estates and give each freed slave “40 acres and a mule”. But this would have created a public demand for land redistribution in the North too, thereby threatening the interests of the large landowners there. Political pressure was applied and it was too much for Stevens’ proposal ever to be accepted.

In case one thinks that this is a thing of the past, a similar thing is happening now in modern Britain. The rural people are being forced out of their home areas by land speculation: “Rural homes are becoming so expensive for house buyers that some properties are fetching 14 times the average local salary ... these are out of the reach of locals, leading to young workers leaving and the slow death of village life ... and causing severe problems for the agricultural economy.”²⁸

A United Nations study of 83 countries showed that on average less than 5% of rural landowners control 75% of the land. Other statistics given are:

- (a) Britain – 0.6% owns 69% of the land, Spain – 0.2% own 70% of the land;
- (b) Venezuela – 3% own 77% of farmland, Brazil – 2% own 60% of arable land.²⁹

Some will argue that this very inequitable distribution is not a tragedy; that those without land are satisfied with their lot, living in cities and having no more emotional attachment to the land. That is probably true for a large proportion of them, but I think it is highly improbable that this 95% landless population chooses to be landless. In that multitude there is bound to be a significant fraction that have a vocation to farming, but are unable to practice it since they cannot obtain land. If they manage to work on the land they are forced to do so as hired labourers and not as owners of their own farms. Thus society is losing that great stabilizing institution, the family farm. With the concentration of land and food production in the hands of a few it is also losing freedom of choice.

28 Wallop, Harry, ‘Rural Locals Forced Out as Cost of Homes hits 14 times Wages’ Daily Telegraph, Thursday, 14 June 2007, page 13.

29 Hartzok, Alanna. “Earth Rights Democracy: Public Finance based on Early Christian Teachings” A paper presented at the Christianity and Human Rights Conference, Samford University, Birmingham, Alabama, November 2004 Also available at

<<http://www.earthrights.net/geodata.html>> Consulted June 2008

IV. THE URBANIZATION OF THE LAND PROBLEM

The word “slum” first appeared in 19th century London, when the burgeoning urban working classes moved into overcrowded and poorly serviced tenements, living close to the factories and industrial plants that employed them. The term referred to what was initially designated “a room of low repute”, but over time took on the generic definition, “a squalid and overcrowded urban area inhabited by very poor people.”³⁰

As industrialization proceeded in the 19th century the plight of the working classes in Britain and Germany worsened. There were occasionally riots which were put down by the army. It was in this soil that the doctrines of socialism and communism naturally took root. Marx thought that the revolution would take place first in England because the conditions there were so bad. The governments of the time realizing the danger undertook a series of reforms to bring about social and economic improvement – laws forbidding employment of children below a certain age, reduction of working hours, recognition of trade unions etc.

Further changes during the first half of the 20th century led to the formation of the Welfare State. The conditions of the poorer classes had improved tremendously and there was a significant middle class.

Many of you will have heard of the indoor board game called “Monopoly”. This was originally called “The Landlord’s Game”, invented in 1905 by Elizabeth Magie Phillips, an American lady, to illustrate the fact that when private individuals are allowed to pocket all the rent, the entire land is eventually owned by a handful of them. Those of you who have played the game know that it ends when one person has bought all the property and everyone else is out of the game. This is a simple and excellent simulation of landlordism long before the age of computers. If the rules were changed by imposing a land tax and the income was fed back to the “Community Chest”, the game would go on indefinitely since no individual would be able to overpower the others economically.³¹ Of course, the game would then lose its excitement. In games, the “Winner-takes-all” rule adds to the excitement, but in real life, it leads to misery for the majority.

30 UN-Habitat, *State of the World’s Cities 2006/7*, (3 ed), (London: Earthscan Publications June 2006), [Available at <www.unhabitat.org> Consulted: June 2008].

31 The game has a controversial legal history. In the original game there were two rounds. In the first round it was played as at present. In the second round it was played under Georgist Land Taxation conditions. Presumably this was to show the effect of land tax. When Parker Bros marketed their pirated version, the second round was eliminated and the street names were changed from those in Chicago to those in London. In 1980’s, Parker Bros. sued in court, claiming their game was original: they lost. Now there are local versions with the street names of the relevant capital cities.

America has always been much more laissez-faire in its economic policies than Europe. This together with its vast resources has enabled it to become the foremost economic power in the world. There have been slum dwellers there since the 19th century but they have been insignificant in comparison to the rest of the population. However, a similar inequity in land ownership occurs and now that America is in economic decline the problem of the urban poor is forcing its attention on the nation. Thus, in 2003, 12.5% of the population was living below the poverty line, 1.25% were living on the city streets or in homeless shelters. In land, 3% of the population owns 95% of the privately held land in USA.³²

The problem of urban poverty is now very large, and with the “Vision 2030” pipedream in the media, it is worthwhile looking at the figures. The annual urban growth rate in Africa is now 4.6%. Currently sub-Sahara Africa is only 40% urbanized. By 2030, 54% will be living in cities. The proportion of people in poverty in urban areas, 43%, is catching up much faster with the proportion in the rural areas, 59%. Cities are growing. Small cities contain 5 – 10 million people, megacities 10 – 20 million and metacities above 20million. Lagos, the fastest growing megacity in the world (5% per year) will achieve metacity status in 2020.³³

People in slums suffer from a lack of: durable housing, sufficient living space, access to safe water at an affordable price, access to adequate sanitation, and security of tenure. Non-empirical evidence indicates that 30-50% of urban residents in the developing world have no legal document such as a title deed or contract to ensure tenure security. Sub-Sahara African cities are the most deprived.³⁴

Various initiatives are being tried to alleviate insecurity of tenure. They are challenged by a complex set of obstacles. The present systems of allocation and use of land for development in cities are inefficient and inequitable. These systems confer benefits on those who operate them, and that is why they are as they are. Public servants line their pockets by illicit means.

In some cities demolition is used to facilitate the growth of landlordism. Bulldozing of squatter settlements inhabited by owner-occupiers both forces such people into rental accommodation and frees land for development of further rental accommodation.

32 Meyer Peter ‘Land Rush – A Survey of America’s Land – Who owns it, Who controls it, How much is left’, Harpers, January 1979 cited in Hartzok, Alanna. *Earth Rights Democracy: Public Finance based on early Christian teachings*.

33 *UN-Habitat, State of the World’s Cities 2006/7*, (3 ed), (London: Earthscan Publications June 2006), [Available at <www.unhabitat.org> Consulted: June 2008].

34 *UN-Habitat, State of the World’s Cities 2006/7*, (3 ed), (London: Earthscan Publications June 2006), [Available at <www.unhabitat.org> Consulted: June 2008].

Then there is the whole notion of illegality. The urban elite wield the law. So the basic principle seized upon by lawyers, administrators and landowners is that to tolerate illegal occupation and use of land is contrary to all precepts of good government. But there is no alternative for the vast majority of illegal occupiers because the official legal system of land allocation and use is beyond their reach; they cannot afford it and they have no connections to get it.³⁵

Also the labelling of popular or informal settlements as “illegal” or “slums” leads outsiders to assume that the inhabitants of these settlements are, if not criminals, then certainly living an inferior lawless kind of existence which needs to be contained rather than encouraged. Nothing can be further from the truth. These settlements have their own “system of ordering” usually modelled on the official laws of the State. So rather than talk about legal and illegal it would be better to use the terms formal and informal.

Several countries are now showing a willingness to develop new and adapt old forms of land tenure to suit urban needs. This flexibility may be contrasted with the rigidity of centralized statutory urban planning systems – a particular deficiency in British Commonwealth countries which adhere to variants of English town and country planning legislation where laws are often treated as immutable.

In many places what the poor want is security of tenure rather than the full legal title to land. The experience of giving land ownership to the urban poor in India is that it leads to large-scale transfers and displacement of the original population through functioning of the market. In view of this, the authorities in many cities are at present resorting to giving or permitting intermediate forms of tenure such as occupation licenses, limited leases, co-operatives, informal assurances of non-eviction etc. These don't give ownership rights to individuals, particularly the right to sell land, but generate enough confidence in them to invest in housing and the local environment.³⁶

In Turkey for the last 50 years, land and housing tenure issues have been determined largely by the legitimacy of realities, rather than by the legal regulations concerning development and use of land. Islamic civil regulations (Seriati) and law (Mecelle, 1869) as practiced during the Seljuk and Ottoman rule, considered individual tenure on land in a relaxed manner especially when it came to nomadic

35 McAuslan Patrick, *'Tenure and the Law: The Legality of Illegality and the Illegality of Legality'*, in *Land, Rights and Innovation*, ed by Geoffrey Payne (London: ITDG Publishing, 2002) (page 28).

36 Kundu Amitabh, *'Tenure Security, Housing Investment and Environmental Improvement: The Cases of Delhi and Ahmedabad, India'*, *Land, Rights and Innovation*, ed by Geoffrey Payne (London: ITDG Publishing, 2002) (page 36).

traditions. It was based on local needs and local approval rather than in deference to some absolute right. Absolute sovereignty in land (freehold) was, after all, that of the Deity. Enjoyment of “God’s garden” was only a “temporary loitering for mortals”.³⁷ Historical customs and modern laws pointed in different directions. As the authorities became incapable of guiding developments, immigrants followed their traditional instincts in settling and building, considering their actions as natural and socially legitimate responses for survival. New laws were enacted specifically to assimilate deviant forms of tenure into the legislative body proper. Now, one frequent solution is “shared ownership” of houses. The Flat Ownership Law (1965, revised 1988) provides a framework of operations for the landowner, developer and individuals to act in partnership in the construction and joint ownership as a method of sharing a multi-unit building and using it independently and privately and also to regulate collective running and maintenance.³⁸

England has something similar, called “Common hold”. This was introduced by the Common hold and Leasehold Reform Act of 2002.³⁹

In Botswana, land in towns can be obtained with a “Certificate of Rights.” This was developed in the 1970s to cater for the urban poor as an alternative to squatting. The holder has the right to use and develop land (in perpetuity), but ultimate ownership belongs to the State. A small monthly user fee is charged and minimum services are installed free of charge. A material loan is available. This makes it easier to develop the plot and as plots develop the area is prevented from degenerating into a slum.⁴⁰

Brazil provides examples of the most innovative reforms of tenure. Due to intense urbanization, 82% of the population is urban. Urban life is characterized by social exclusion and spatial segregation. The vast majority lives in precarious material, social and environmental conditions. This is all due to (i) an absence of a comprehensive housing policy at all levels of government, and (ii) legal-political restrictions on state action to control urban development, and (iii) a highly concentrated, privatized land structure formed over five centuries, and (iv) the unfavourable dynamics of the speculative urban land market which has produced a

37 Balamir Murat ‘*Legality and legitimacy of tenure in Turkey*’, Land, Rights and Innovation, ed by Geoffrey Payne (London: ITDG Publishing, 2002), page 158.

38 Balamir Murat, page 171.

39 *Dictionary of Law*, ed by William J Stewart, (Glasgow: Collins, 2006).

40 Saad S Yahya, ‘*The Certificate of Rights story in Botswana*’, Land, Rights and Innovation, ed by Geoffrey Payne (London: ITDG Publishing, 2002) (page 195).

large number of vacant serviced areas in the main cities. Slums are called “loteamentos” and “favelas”.

Conservative legal provisions regarding definitions of individual property rights have worked to the detriment of the social function of property. Policy-makers had the problem of the legalization of invaded public and private land. Eviction was not a viable option due to the numbers involved and the probability of the violence which would follow. The most innovative approach was the “Concession of Real Right to Use” (CRRU). It is a material right over land, which can be opposed against other claims. It is not a simple administrative permit that can be easily revoked. It is a kind of leasehold – a real right over someone else’s property. It does not confer full ownership, but it prevents eviction.⁴¹ This provides social housing, rights and security of tenure without giving up public land and minimizes the likelihood of the beneficiaries being “forced” out under pressure from the land market.

In Kenya, a new land management model called a Community Land Trust (CLT) entered the same in 1990. The CLT concept was developed in USA, but has its origins in traditional African and Islamic land tenure systems. In a CLT, land belongs to the community with individual members owning the development and improvements they have made on the plot. This discourages absentee landlords. When a member moves out he can only sell the development on the plot, but the land is not included in the sale price. This was tried successfully in the Tanzania-Bondeni settlement of Voi, where after consultation with the stakeholders, the CLT model was preferred to individual titles as the tenure system suitable to them.⁴² This type of project benefits the community rather than just the individual. The people grasped the CLT concept very quickly and accepted it. However, the bureaucrats and those in power took a much longer time to be convinced.

Summarizing: tenure means different things to different people. For the very poor it is primarily a matter of being able to access any space where they can obtain a basic livelihood without fear of eviction. Location is far more important than the form of housing they occupy, since long-term security of tenure may be less important than the ability to move easily when better job opportunities arise elsewhere.⁴³

41 Fernandes Edesio, ‘Combining Tenure Policies, Urban Planning and City Management in Brazil’, in *Land, Rights and Innovation*, ed by Geoffrey Payne (London: ITDG Publishing, 2002) page 214.

42 Saad S Yahya, ‘Community Land Trusts and other Tenure Innovations in Kenya’, in *Land, Rights and Innovation*, ed by Geoffrey Payne (London: ITDG Publishing, 2002) (page 237).

43 *Land, Rights and Innovation*, Geoffrey Payne, ed (London: ITDG Publishing, 2002), (page 300).

Given the present legal order, in too many countries the law operates to the benefit of the affluent few rather than the poor majority. Tenure policies must avoid the simplistic solution of giving the poor individual titles. Arguments claiming that this of itself reduces poverty are not supported by evidence.⁴⁴

It must also be recognized that at present the resource base and administrative capabilities of most government urban development agencies are grossly inadequate for the task of managing the process of urban growth and balancing the competing interests of landholders, developers and the increasing number of poor households seeking shelter.⁴⁵

“The positive correlation that exists between the level of national wealth and the quality of housing means that there are higher proportions of poor urban dwellers in Asia or Africa than in Latin America. In addition it is probable that the African and Asian urban poor live in worse conditions than do their Latin American counterparts. Standards of servicing, for example, are superior in Latin America to those in Africa and Asia. In Latin American cities the poor must wait several years for electricity or running water to be installed, but services normally arrive. By contrast, the poor of most African or Asian cities may never receive services ... While these superior services may be disproportionately concentrated in middle- and upper-income housing areas, even the Latin American poor benefit to some degree from higher levels of national and urban resources.”⁴⁶

V. THE ETHICS OF LAND OWNERSHIP

With the coming of Christianity it might have been expected that there would be a change of mentality. Christianity, being the fulfilment of Judaism, naturally took many of its ideas. Here are a few taken from the Old Testament:

Lev 25:23, 24 “The land must not be sold in perpetuity, for the land belongs to me, and to me you are only strangers and guests. You will allow a right of redemption on all your landed property”

Nehemiah 5:11 “Return them their fields, their vineyards, their olive yards, and their houses forthwith.” – The words were addressed by Nehemiah to the rich Jews who had lent money to the poor and received their property in exchange.

Psalms 115:16 “Heaven belongs to Yahweh, earth he bestows on man”

44 Geoffrey Payne, page 305.

45 Geoffrey Payne, page 305.

46 Abbott, John. ‘Sharing the City’ (London: Earthscan Publications, 1996) (page 99).

Proverbs 23:10 “Do not displace the ancient landmark or encroach on orphans’ lands.”

Isaiah 5:8 “Woe to those who add house to house and join field to field until everything belongs to them and they are the sole inhabitants of the land.”

Land was *koinonia* – common to all as God’s gift to the community so that there would be *autarkeia* – self-sufficiency for all.

As we saw in section 3, the Church in the temporal order did not live up to this ideal as well as would have been expected. This omission eventually provoked a reaction against religion and the worship of God. But the Church, being a perpetual institution, has a long memory and learns from its mistakes. It has to be admitted that now it has the largest body of Social Doctrine of any institutional body in the world. In Africa, the poor instinctively know that the Church is on their side and in most places it has a moral authority far outweighing that of the State. The Church has not betrayed its foundational principles. Its persecution and loss of most of its landed property in the last few centuries has had the effect of liberating it to proclaim its doctrine without compromise. This is well illustrated by the document “Towards a Better Distribution of Land” by the Pontifical Council for Peace and Justice, 23 November 1997. Where Church thinkers still fall short is in failing to recognize that land cannot be lumped together with other forms of private property. It belongs in the separate category of the gifts of nature which cannot be subjected to private ownership. This will be explained shortly.

(a) Ethical Foundation of Land Ownership

It is no use appealing to the law to solve the Land Question. The law does not tell us about the rightness or wrongness of an institution. For that we must turn to ethics. For example, slavery was permitted for a long time in many countries. When it became illegal, it didn’t then become wrong; it had always been wrong.

Similarly, in looking at the institution of Land Ownership based on the concept of “land as property” we should ask ourselves, is this right or wrong, real or imaginary?

What is Property? A philosophical description would be: “Property is that which belongs exclusively to the person.”

The consequences of this are: (i) a person’s life and limbs are his property and cannot be misused by another. Thus murder, mutilation and rape are wrong. (ii) A person belongs to himself and cannot be owned by another. Thus slavery is wrong. (iii) A person owns the products of his labour. Thus stealing is wrong. (iv) Since in

society there is division of labour, people exchange the products of their labour through the medium of money. Consequently, what a person buys legitimately from another becomes his property. (v) A person can claim ownership of *Res Nullius*, i.e. things which no-one has yet claimed as his own.

For this next section, it may be helpful first to read “Appendix 1: Land Ownership, Occupancy and Use”.

Is Land property? No it is not, because land is in a different category for three reasons. Firstly, land is not a thing but a Place, or in philosophical terms, it belongs to the category of Location not substance. One simply cannot own a place, one can only occupy it. It is not merely that one has no right to own a place; but rather that owning a place is a metaphysical impossibility. Secondly, the land was there before mankind came into existence. No person ever made land. Consequently, a person cannot own land since it is not proper to him, neither can he own land by buying it off another, since the seller in turn doesn’t own it. Thus, land cannot belong to a person. It can only be occupied by a person. Thirdly, land is immortal, as is explained by Borruso:

All ancient cultures, wherever we may look, abided by the same principle of communal property of land. The natural, common-sense reason underlying this common cross-cultural thinking is that land (a) is not man-made, and (b) is immortal. Therefore communal property of land is a true natural right, for a community is as immortal as the land. Individual landed property is a creature of the law. It grants not a right but an unjust privilege to a mortal to call ‘his’ what he has not worked for, what he found readymade and what one day he will have to leave willy-nilly.⁴⁷

Is there a right to occupy land? Yes, there is. People are land creatures and they must have land for their shelter and work. Human nature demands access to land for survival, although this access need not be direct. Thus the right to occupy land is a natural or human right. Without land a person becomes impoverished or a slave.

Consequently, there can only be land “Occupancy” not “Ownership”. Land “ownership” is a legal fiction. The fiction can be clearly seen in the case of the Moon. The Americans were the first to land on the Moon. Presumably, they could stake a claim to the Moon. If they did, would the Moon really belong to them?⁴⁸

47 Silvano Borruso, ‘Property Rights’, 18 January 2008. A private publication available from <silvano.borruso@gmail.com>

48 Actually there is an international convention forbidding nations from claiming outer-space. This is thus another indicator that land ownership is a fiction.

Modern title deeds are really entitlements “to occupy” not “to own”. Acknowledgement of this would allow conditions to be set for the good utilization of land, something that is not fully implemented at present since by the nature of things conditions of use cannot normally be set to something which is truly owned.

Law does not provide the ethics for any institution, but since law is based on customs, and customs are generally ethical, the difference between the fiction of land ownership and the reality of land occupancy occasionally comes to the surface. This is illustrated by the difference between English common law and civil law.

In common law the historical basis of property in land is that only the Crown can own land. A landowner, strictly speaking, does not own the land but a Time in the land, an interest called an Estate. Ownership is not attached to the land itself but to an abstract entity, the estate, that is interposed between the tenant and the land. The estate is purely conceptual and yet it is treated by law as if it were a real thing. Estates can be classified in two main ways. The first is according to duration. Here there are two categories: Freehold, which is an estate having indefinite duration and Leasehold, which is an estate existing for a specified time. Thus it can be seen that, according to its original usage, even with Freehold the tenant doesn't actually own the land. The second classification is according to actuality-potentiality. Here there are two categories: An estate in Possession, which gives a person the right to immediate possession of the land, and an estate in Expectancy, where he must wait for his right to take effect. Expectancy is subdivided into Remainders and Reversions. A Remainder is an estate becoming effective when the estate of the previous owner expires and it does not return to the grantor. A Reversion is an estate in which the right to enjoy the land is postponed to a future date and the land eventually returns to the grantor.

In the system of civil law ownership is simple. There is no abstraction of an estate between the owner and his property, nor is it built on ownership as in the case of a trust. There is no temporal division of ownership; a person either owns a thing or he does not. The content of ownership may be limited as when “burdens” are created. These burdens are regarded as restrictions on the use of land rather than as rights to separate or concurrent ownership.

The more ancient common law reflects the true situation. The estate is the enjoyment of the land, not the land itself. Early on in the feudal system, this is what the nobility received from the King, but later they forsook their civic obligations and abrogated to themselves the land itself and from this situation arose the civil law definition of land ownership.

Separate from the discussion on Ownership versus Occupancy is the question of whether land should be held in common or individualized. I am not opposed to individualization of land tenure per se. There comes a time when common land tenure seems to lead to lower productivity than individual tenure due to population pressure. I am not suggesting the reversion of individual tenure to communal tenure. That is neither possible nor desirable. I say let communal tenure be, but as the situation in a country changes let individualization occur in step with its needs. What is important is that those who have exclusive use of land should pay the community for that privilege, something which is dealt with in the next section. Land ownership should be turned from an asset into a liability.

VI. DILEMMA BETWEEN PRIVATE GOOD AND COMMON GOOD

Land belongs to the entire human race, not to an individual, and yet every individual has a right to occupy land. This gives rise to a dilemma, since there is not enough land to go around. What then is the solution to the dilemma? Before answering that question it is necessary to expose a modern mechanism that intensifies the dilemma.

The proponents of the sanctity of private property in land maintain that freehold tenure enables the dwellers to use this land as a source of wealth with an increase in value over time, i.e. by converting land into a commodity and using it to obtain a loan from a bank to pay for further development. They claim that individualization of tenure leads to increased security, but, as was stated earlier, communal tenure can be just as secure. What gives extra value to land is not the increase in security of tenure but the concentration of that tenure in one person. The concentration of power in one person is always more effective, for good or for evil, than dispersion of power in a group. There is unity of purpose in the use of the land. So we see then that this power put to good use can lead to increasing agricultural production and value of land, and when used badly can be destructive as in the cases of industries that pollute land without a care.

But land held for investment and speculation inflates in value and makes land less accessible and more expensive for others. Land cannot respond to supply and demand dynamics since the supply is fixed. The commoditization of land and land speculation inflates land values so that those who only have labour to trade with must pay higher and higher amounts for access to land for shelter. Taxes on labour reduce their purchasing power even more. Those with more valuable land see their wealth increase above that of those with poorer land and they may use this greater wealth to acquire additional land. Land values rise more than wages. The landless must pay more to buy land or take loans and pay more in interest to banks. If they

become unemployed and cannot pay the mortgages they must surrender the land. So the commoditized land tenure and land-backed mortgage banking system is not the solution, it is the problem.⁴⁹

What gives value to land is society and as population density goes up land values go up. When people live in close proximity to each other their lives are enriched so much more by the services that they can render each other (division of labour), whereas in remote areas, although there is the sense of space, life is poorer. That's why as the city is approached the value of land increases. The classical example of the power of population pressure to affect land prices is the phenomenon of the American ghost towns. With the discoveries of gold in the 19th century people would rush from all over the world to start mining and become rich. Almost overnight bustling towns would spring up in the middle of the wilderness. The resultant town life was the subject matter of the innumerable "Westerns" which we all liked to see. When the gold was exhausted, the people moved on to another place. They couldn't even sell their houses or land since nobody wanted to buy. There now remain dozens of empty, dilapidated, wind swept, haunting places called ghost towns, sitting on land which is worth next to nothing, possibly even free for the asking.

In the rural areas the value of land is given primarily by its agricultural potential and secondarily by its location or site. In the city it is only the site that counts. For example, in Nairobi, there are many empty plots. Each of these was bought a few decades ago for a few thousand shillings and now is worth millions of shillings. Why is this? It is not because of what's ON them, because there is nothing there, but because of what is AROUND them. Surrounding these plots are the Muthaigas, the Lavington's, the Loreshos ... of Nairobi, with all their services; tarmac roads, piped water, electricity, telephones, shopping centres, sports clubs, good schools. It's all this that makes them valuable. The community has contributed all this value. When the owner of a plot sells it, he will make millions of shillings profit for doing nothing. In all justice he cannot be allowed to walk away with that wealth, since it was created by the community and so must be returned to the community in the form of taxation so as to finance greater improvements. Let him keep the interest he would have earned with the original money, but the rest must go to the public coffers.

49 Hartzok Alanna, 'Land for People, Not for Profit' Green Revolution, 56, 4, (1999) also published on the Bulletin Board website of United Nations Center for Human Settlements' Global Campaign for Secure Tenure.

There is the English word “landlord” which has several closely related meanings. The term, “Landlordism” has been coined by some authors and it can be described as the situation where a private individual levies a private tax called “Rent” on another for the right to work on a piece of land and keeps the tax entirely for himself without passing anything onto the community.

It follows then that an individual in his role of landlord does not produce wealth, he merely lives off the work of another, and uncharitable though it may sound, the reality is that he is a parasite. He may well have other roles; a developer, an entrepreneur or a worker. As a developer he may have built a housing estate. He is entitled to receive the rent which the tenants pay him for living in the houses, but that component of the rent which corresponds to the land must not be kept by him but be passed onto the community. As a farmer working on his own land he is entitled to payment for his produce, but must pay something to the community to compensate for having excluded someone else from working on the land.

(a) Land Taxation: The Solution to the Dilemma

The solution to the dilemma is to impose a tax on the value of the land. In this way those who have the direct use of land give something back to the community for the benefit they get from that use. By means of this tax the community can provide for law, order, security and the improvement of services. This repayment is called Land Value Tax (LVT). Since this tax could replace most of the others: VAT, PAYE etc, it has often been called “The Single Tax”. VAT and PAYE put a burden on that sector of the population which is producing wealth; workers and entrepreneurs.

The simple solution of imposing a realistic land value tax has been implemented in various places with beneficial effects. The idea of taxing the land itself, rather than what was on it, was first proposed by a group of economists in France called the Physiocrats. The next one to propose it was Henry George (1839 – 1897) in USA in his book “Progress and Poverty”.⁵⁰ He distinguished between property in land and property in wealth produced by human labour. The latter belongs entirely to the producer and should not be taxed. Hence, VAT and Income tax should be abolished. The value of the land as a whole is sufficient to bear the entire expenses of government. Those with more valuable land would pay more into the common fund. Land value tax thus becomes equivalent to a User Fee.

50 Henry George, *Progress and Poverty* (New York: Robert Schalkenbach Foundation, 1997).

Some authors claim that Henry George was a supporter of Karl Marx (1818 – 1883); far from it! He was a believer in God (Episcopalian) and very much in favour of free enterprise. What he was opposed to were monopolies by private companies and trade tariffs by governments. His taxing of land has nothing to do with the State ownership of land.

Here is a list of the beneficial effects of Land Value Taxation in general before we go on to specific historical examples:

- (a) it discourages land speculation;
- (b) it reduces the price of land to equate it with its value for productive purposes;
- (c) it reduces interest rates as land becomes more affordable;
- (d) it eliminates tax evasion since land cannot be hidden;
- (e) it promotes industry and commerce by lifting from them the burden of taxation.

In the rural areas:

- (a) it enables newcomers to buy farmland;
- (b) it limits farm sizes to those of optimal productive units;
- (c) it prevents rural depopulation;
- (d) it discourages the purchase of farms for real estate speculation and tax shelter opportunities.

In the urban areas:

- (a) it reduces house prices;
- (b) it encourages owner-occupier rather than landlord-tenant;
- (c) it encourages earlier marriage and starting a family since home ownership is so much cheaper.

Land Value Taxation reduces urban sprawl. Sprawl is low density discontinuous land development which plagues much of modern society, especially the cities in the USA. Sprawl negates the purpose of cities which is to let people live and work close together so as to enjoy the maximum efficiency of community facilities and enterprises. Sprawl results from landowners holding out for high capital gains on land they bought cheaply long ago. The landowner can gain money by developing a site and renting it or selling it to someone who will develop it or he can wait until population increases, wage increases or public infrastructure improvements impart value to the site, which he can appropriate through a higher rent or sales price. All too often land near public infrastructure (subway stations or major road intersections) remains vacant or underutilized because the landowner is waiting for

a price in excess of what buyers will pay today. This forces developers to seek cheaper sites further away from public infrastructure. Once this cheaper land is developed the new occupants petition the municipality to extend the infrastructure to it. This raises prices there, chokes development and again drives developers further a field.

Sprawl increases the cost of mass transit and necessitates automobile travel. This in turn contributes to air pollution; time wasted in traffic jams, the endangering of health by increasing stress and car accidents. The per capita costs of infrastructure are higher because roads, sewers and power lines have to be extended through sparsely populated areas.⁵¹

VII. HISTORICAL EXAMPLES OF THE IMPLEMENTATION OF LVT

Land Value taxation has shown itself to be beneficial in almost all instances of its application. It's not a dream of how we would like things to be; it works. Looking first at applications in agricultural areas:

The first land value taxation in modern times started in California. In 1886 a cattleman, Henry Miller, owned one million acres and had full rights to the water of the Kern River. To correct this aggrandizement, the State allowed communities to create by popular vote irrigation districts to build dams and canals and pay for them by taxing the increase in land value. Once irrigated, the land was too valuable to use for grazing, and the tax made it too costly for hoarding. So cattlemen sold off fields to farmers at prices the farmers could afford. In ten years, the land value tax turned the Central Valley into over 7000 independent farms. Over the next decades, those treeless, semi-arid plains became the garden of America.

Taiwan instituted land value taxation during the 1940s to redistribute land and increase food production. Prior to the arrival of the Nationalist Party, most of the island's people were landless peasants and were afflicted with hunger. Fewer than 20 families monopolized the entire island. So the new Nationalist government implemented the policy of taxing farm land according to its value. Soon the large plantation owners sold off their excess to farmers at prices the peasants could afford, which, according to the World Bank, laid the foundation for subsequent rapid development. Working on their own land, new owners felt inspired to work harder. They produced more, kept more and lived better.

51 Hartzok Alanna, 'Pennsylvania Farmers and the Split Rate Tax', in *Land Value Taxation*, ed. by Kenneth C Wenzer (New York: ME Sharpe Inc 1999) also available at

www.earthrights.net/docs/pa-farmers.html Consulted June 2008.

In Australia LVT is called “site rating”. Site rating was first applied to the shires of Queensland in 1887 to ease the position of genuine farmers. It has since developed to become the dominant taxation system in Australia where it is used by $\frac{2}{3}$ of the local authorities and is used by more than 92% of the municipalities. During the depression years of 1930–39 the total acreage being farmed in site-rated areas increased by 21%. In those areas without site rating the acreage decreased by 8%⁵².

The Danes have traditionally believed that the land belongs to the people. Rapid industrialization and land enclosures in the 18th and 19th centuries saw this tradition attacked. In 1902 the farmers formed the Henry George Union to press for land taxation. Eventually in 1957 the Justice Party came to power and implemented LVT. Land speculation ceased immediately. The result was that from 1957 to 1960 the enormous deficit in the balance of payments was turned into a surplus, foreign debts were reduced to a quarter, unemployment was replaced by almost full employment, inflation was brought to a standstill, there were no strikes, industrial production went up 32 per cent and investment rose 135 per cent. This was reported in the *New York Times* of 2 October 1960 under the heading “Big Lesson from a small Nation”. This all changed after 1964 when the Justice Party lost power due to other policies which were unpopular and because there was a lack of public understanding of the basic principles of LVT.

For applications in the urban areas, San Francisco offers the most spectacular example. In the earthquake of 1906 most of the city was burnt to the ground. It was given no State aid, nor did it have any royalties from natural resources like oil, its great bridges were unbuilt and its populace had no exceptional abilities. With very few assets the city recovered by using the local property tax. The secret is that it taxed the ground itself forcing the landowners to get on with development or get out of the way. There was a great burst of civic works. People flocked there to open businesses, find jobs and homes. Its population grew by 22 per cent in 1900–1910, in the very wake of its destruction; another 22 per cent in 1910 to 1920 and another 25 per cent in 1920 to 1930. It did this without expanding its land area, and while providing wide parks and public spaces.⁵³

The State of Pennsylvania, although not so spectacular, is the best example of consistent application of land taxation over the years. Pennsylvania has had a split rate tax since 1913. Split rate is a tax partly on building and partly on land. In 1979,

52 Hartzok Alanna, ‘Pennsylvania Farmers and the Split Rate Tax’, in *Land Value Taxation*, ed by Kenneth C Wenzer (New York: ME Sharpe Inc 1999) also available at www.earthrights.net/docs/pa-farmers.html Consulted June 2008.

53 Gaffney Mason, ‘The Great Crash of 2008’, *Groundswell*, July/August 2008.

Pittsburgh, the biggest city, increased the rate of land tax greatly. Comparing Pittsburgh with 15 other cities on the east coast of the USA, the average rate of building went up 70 per cent in Pittsburgh but decreased by 14 per cent in the rest. This shows the effect of “infill” – construction on vacant plots within the city.

In 1982 Harrisburg in Pennsylvania, was considered the second most distressed city in the USA. In 1982 it started taxing land at a rate three times that of buildings. This resulted in an economic resurgence. The number of vacant buildings (most of which would be dwellings) reduced from 4200 to 500. With a population of 53,000, employment increased by 4,700, crime dropped by 23 per cent and outbreaks of fire dropped by 51 per cent.⁵⁴

Singapore began its success story on a firm footing of land reform. The city-state reached a tax rate on land of 16 per cent. Similarly, Hong Kong funded 80 per cent of its budget with 40 per cent of site rent.

After the break-up of the Soviet Union, Estonia had to find a way of raising revenue and found it in land taxation. Implementation of it was unopposed since the original landowners had either been liquidated by the Communists or had fled the country a generation before. Because neither land nor its value can be hidden, it was the most feasible way for the new government to raise funds. Collecting from farmers was vastly more successful than trying to collect it from others, succeeding over 95 per cent of the time.

VIII. LAND VALUE TAXATION AND LAND TENURE

There are two distinct matters to be decided upon; firstly, the matter of Ownership versus Occupancy, and secondly, whether or not to levy Land Value taxation.

(a) With regard to the first, the more radical step would be to convert all ownership titles into occupancy titles. This would allow conditions of use to be applied, something which cannot be done to freehold ownership at present without legal inconsistency. The conditions of use would be determined by sound ecological and agricultural principles. This would be good social ethics since the land would be put to the best use. This change will make very little difference to the present situation since in reality people have never owned land, they have merely occupied it. With the new arrangement everyone will continue to occupy the land they already “own”. As I have asserted previously, owning land is a figment of the imagination and a legal fiction.

54 Hartzok Alanna, ‘Pennsylvania’s Success with Local Property Tax Reform: The split Rate Tax’, *American Journal of Economics and Sociology* 56, 2 April 1997 (205).

We can imagine a conversation between a Landowner and a Georgist:

L: "If you abolish land ownership we will all lose our land!"

G: "No, you will not lose your land. Landownership is not about to be abolished because it never existed in the first place. You cannot lose what you never had. Man has never owned land, he has merely occupied it. We are only changing the terminology. The correct terms are now going to be used: "occupancy" instead of "ownership" and "occupier" instead of "owner". Your title deed will remain; it will become a title to occupy instead of a title to own. No one can throw you off your land at the moment because in law you "own" it. Nobody will be able to throw you off your land in the future because you will occupy it. Occupancy is the new right. You don't own land, you occupy it, and by occupying it you are able to own and to use the things that are on it – natural things (minerals, crops, animals) and man-made things (houses). After all, the reason why you want to "own" land at present is to have exclusive use of the things on the land, isn't it? What's the purpose of having land if you can't use what's on it?

In the new system, the title holder will have the first option to renew his occupancy when it expires, and in any challenge the burden of proof will be on the challenger to prove that the present occupier has not been fulfilling the conditions. If this is too radical, then let the people retain their title deeds of "ownership", but convert all freehold into leasehold.

Occupation titles will be renewable. In agricultural areas this presents no problem since generation after generation the land will be used for agricultural purposes and it is reasonable to allow the man who is occupying it now, or his descendant, to renew the occupancy at the end of the leasing period.

Cities are different. The lifestyle in a city changes gradually from one generation to the next and this requires a gradual change in land usage for the common good of the city. Consequently, titles of occupancy should not be automatically renewable. The present freehold ownership hinders the development of cities. The owner must be bought out at a high price before his antiquated structure can be removed for new development. Leasehold ownership eases the situation; the lease is not renewed upon expiry. With occupancy titles, things will be even easier. The occupier will only own what he has constructed on the site and the municipality need only compensate him for that when he is asked to leave.

(b) With regard to the second point, the author is clearly in favour of land tax. That is the thrust of this paper. A just land tax will be the great leveller. Its effect

will be to convert all freehold into leasehold of indefinite duration. It will not really matter whether land is freehold or leasehold for 99 years or 999 years, provided everyone pays the land tax. Still, it would be preferable to abolish freehold rather than leave it in place, since the legal definition of freehold would have to be changed for it to be subject to land taxation.

(c) The remaining question concerns the manner of implementation of the tax.

Firstly, what should not be taxed? This would be all State land, land dedicated to a directly communal purpose and land occupied by registered charities. This would include things like hospitals, mortuaries, orphanages, places of worship, recreation grounds etc.

There would be exemptions for hardship cases. For example, the poor widow living on valuable property who cannot afford to pay the tax. She could be allowed to live there tax free. At death, the one who inherits it from her and occupies it will have to start paying the full tax. The tax will not be back-dated. If the inheritor immediately sells it, then the unpaid tax from the widow's years must be paid. If there is no one to take up the property, let it revert to the State to be sold in public auction. The subsistence peasant farmer would also be exempt since if he were evicted from his land for not paying the tax, where would he go? He is already at the bottom of the ladder. The purpose of taxation is not to destroy people.

Then there is the question of the rate of taxation. Optimum rates seem to be about 3 percent. This may seem to be high, until one realizes that it is 3 per cent of today's inflated values. Once land taxation is proposed land values will start to fall, and, with full implementation, will fall further.

The frequency of collection should be annual, and staggered, not like the present day PAYE return where everyone is rushing to meet the same nationwide deadline and having to wait in queues in a narrow time interval.

There will have to be a gradual shift in taxation from earned income to land and phased in such a way that the gross national tax revenue is constant. A minimum of 5 years should be taken with 20 per cent incremental changes each year. In some cases that may be too rapid and a shift over a period of 10 years may be necessary. People need time to adjust to the new situation.

This new regime will require a more professional civil service than at present. Sections of it will have to be retrained. Governments may baulk at the work involved, but most government services in the developing world are badly in need

of overhaul and until it is done services will not be rendered to the populace. Land taxation requirements may be the catalyst to bring this about. Computerisation and good record keeping will be essential. There will be need for accurate land monitoring and production of cadastral maps.

IX. PROBLEM SOLVING IN KENYA

Before dealing with the specific problems of Kenya I will first show how the move from Ownership to Occupancy will greatly facilitate the settling of the land disputes in general.

All of our troubles stem from the fact that we continue to believe that land is property. If we could accept that it is not, a lot of trouble would be avoided as follows.

Take first the example of true property: a motor car. It is stolen from its owner and sold to an innocent third party. Eventually the owner traces it and demands it back from the present "owner". We all accept that even though the present possessor of the car is put at a loss, the right thing to do is for the original owner to be allowed to repossess it. The fact that the original owner had several cars and was not using the stolen one does not justify the theft.

Now if we truly believe that land is property, we must follow the same logic in order to be consistent, but this is going to cause all sorts of problems; i.e. the modern landowners will have to give up their land to the original owners or their descendants. The present landowners have their predecessors to blame. Their claim to first title we know is false, since the land taken in the beginning was not empty land. The British had no right to claim any land as Crown land. They brought to this country the idea that land is property and evicted the communal users of land who had no such idea. The descendants of those people, the present landless, have now taken up the idea of land as property and are demanding back their property. The situation is also complicated by false claims and counterclaims. The result is confusion, a mess, an impasse and the authorities are afraid to act.

However if we can see and accept that land is NOT property, everything changes and the impasse is broken as follows.

An innocent third party occupies land which was stolen from another. There are several possibilities. (a) If he is using it and living on it, leave him in peace since the original occupier doesn't own it. It makes no sense to evict the present occupier since one landless person will be replaced by another. (b) If he has other land which he is not using then the unused land should be given up to the landless.

That land is not his property. This is not like the case of the man with two motor cars. Being constrained to drive only one a time does not permit someone else to take the other one. Cars are property but land is not. Those with unused land should lose it if there are others needing it. If someone is holding unused land he has no right to prevent someone else from occupying it. He may be occupying it indirectly by employing others to work on it, in which case it is not unused and he may keep it.

With regard to squatters, those who are squatting on land are normally doing so because the title holder or the State has no use for it. The squatters should be acknowledged as the rightful occupiers and the stigma of “squatter” should be removed from them.

If the present holder is not an innocent third party, because either he took the land from the original occupier, or the land is obviously meant for public use, then it must be confiscated.

This approach coupled with land taxation will make land come onto the market and bring down the price and the present landless can be accommodated.

Turning now to the situation in Kenya, firstly I will deal with a few specific problems. My critique of the National Land Policy draft paper is in the Appendix 2. I would like to state that on the whole I am in favour of the Policy.

In the rural sector there are the problems of misused Trust land and settlement schemes, the Coastal ten mile strip, the invasion of the Mau forest and the relentless subdivision of land in some parts of Central Province.

The feasibility of converting the Trust Lands to Community Land Trusts should be investigated. The Trust Lands should be taken out of the hands of the County Councils since the councillors in these have shown themselves to be irresponsible. The Voi model could be replicated.⁵⁵

The wrongs committed in the Trust Lands and Settlement Schemes should also be rectified following the recommendations of the Ndungu Report, but not to the letter. It would be better to avoid prosecutions since the court system is already overwhelmed. Instead, confiscate the land from the guilty parties and allocate it to the genuine landless. The confiscatees paid very little for it and they have had time to recover their investment so they cannot in justice demand compensation. If they

55 Ndungu, Paul N, Chairman, *Commission of Inquiry into Illegal/Irregular Allocation of Public Land* (Nairobi: Government Printers, 2004) (page 15).

also have land elsewhere, as I am sure many have, they can still survive well. If they have no land elsewhere, leave them in peace.

In the ten mile strip at the Coast, where there are squatters on the land, they should be given the title deed. Since the absentee landlord is not benefiting from the land, he suffers no real loss if “ownership” is taken from him. The squatters have nowhere else to go; it is their ancestral land. An alternative to giving individual titles would be to convert the strip into a zone of Community Land Trusts. This would work where there are many contiguous small plots with squatters. Where the owner of the title is actually living on the plot he should be left in peace.

With regard to the recent problem of the Mau: the people in the forest must be evicted and resettled elsewhere. The “elsewhere” can come from the large tracts of land which will come onto the market when land taxation is introduced. Some of the squatters in the forest could be allowed to remain on condition that they undertake re-forestation and inter-cropping. Re-forestation is needed to be done to reverse the damage.

The increasing subdivision of land in Central province is a result of individualized freehold in land. Since it is freehold the law cannot prevent this. Land becomes cut up into smaller and smaller parcels to accommodate the next generation, but in doing so the land becomes economically unviable. This must be reversed by conversion to leasehold and by the imposition of “conditions of use” on land occupiers. This problem, now in its early stages, also illustrates that land reform, although urgently necessary, is not the panacea for society’s problems. (There is also the need for monetary reform, but that would be the subject of another paper.) Eventually with a sufficiently large population, this pressure for sub-division will be everywhere.

Apart from these four problems arising from the misdeeds of the past, there is another which is often overlooked but which contributes to the land problem; some tribes have more land than they are using. Visitors to Nyanza often comment about how green and fertile the land is, but how underutilized it is. From a particular dwelling all the land in sight is owned by relatives, but is largely unoccupied because the relatives are absent – abroad or in Nairobi. I have been told of a case where a family has 40 hectares of fertile land and they are living in poverty. Clearly there is something wrong here – either the lack of credit for farmers due to the conventional banking system or a cultural attitude to work that has to be changed. What applies to individuals should also apply to communities, since, like individuals, they too ultimately do not own land. Many tribes have

migrated to their present locations over the generations. They do not claim ownership of the land they occupied 500 years ago because they have moved on; they are not occupying it. Communities then should also pay land tax to Central Government. This would pressurize them to make good use of their land. It would be in their interest to allow other groups onto their land to work it (leasehold) so that the community can pay its quota in taxation. The leaseholders will pay rent to the community which in turn will pass it on in tax.

With regard to the urban sector, I recommend following the Ndungu report on the whole. Where land for roads, highways, recreational parks, playgrounds, stadium, public schools, hospitals, markets, fire stations, police stations, toilets, cemeteries, theatres, monuments, historic sites, social halls and research institutions has been stolen it must be recovered since without these proper town planning is impossible.⁵⁶ Ndungu suggests a “chain reaction” of legal suits where the present owner of illegally allocated land who is an innocent third party can recover his rights. In some cases this will be possible but I suspect that the court system will not be able to cope. It may be better if the person is compensated by the allocation of a plot of similar value confiscated from the person from whom he bought it. However, if the plot is obviously on a road, then he is NOT an innocent third party, in which case there should be no compensation.

Although wrongs have been done we must be careful not to attempt the impossible task of righting every wrong. Even righting most wrongs is probably impossible. Remember that at the time there was a break-down in law. There was a feeding frenzy of public goods which was initiated by the highest officers in the State and carried all the way down to the lower ranks. Consequently, many people who would normally be responsible and act in a restrained manner were carried away by the atmosphere of the time. To right every wrong probably 100,000 people would have to be imprisoned! A seriously implemented Land Taxation program can get us out of this difficulty eventually. If it is done then time will heal the wounds and right the wrongs since land will no longer be the talisman that everybody scrambles for.

X. OBSTACLES TO PROGRESS

Without doubt the greatest obstacle to the widespread implementation of land taxation is the equally widespread misconception about property in land. Due to civil law practice over the centuries and the education system, most people believe that land can be owned. Any attempt to discredit this belief without using well-

56 Paul Ndungu, page 73.

reasoned arguments will be viewed as an attack on private property per se and as such a communist doctrine which must be opposed. If they could only see that the vast majority would lose nothing if land became “un-ownable” in law. The vast majority of people don’t own land anyway and yet they survive and live fruitful lives. The small-holders are under the mistaken notion (fostered by the big landowners) that if land is declared not subject to ownership then they will all be thrown out onto the streets the next day. This will never happen. Ironically, history shows that the ones who were thrown out onto the streets were the traditional communal land users who had their land taken from them during the enclosure period so that the new “land owners” could enjoy the “sanctity” of their first registration of title.

They also imagine that if they are only leasing land rather than owning it then they will be at the mercy of the political whims of the government of the day. Little do they realise that the modern State has many ways of making life unbearable for a person without having to confiscate his land. They do not realize how fragile land ownership is. The outbreak of war or civil strife can often be the reason to flee for dear life from one’s locality. Of what use is land ownership then? The people displaced from their land in January are proof of this. Those who have tied their livelihood to the land in those situations suffer more than those who merely lease the land and are prepared to move on when better opportunities arise.

The next obstacle is the large landowners. They simply do not want to pay land tax. They exist in every country. In Kenya they are represented by the Kenya Landowners Association (KLA). In 1909 the Prime Minister of England, Lloyd George, proposed to introduce land taxation into the budget, but it was rejected by the House of Lords. A more correct name for that institution would have been “House of Landlords” since its principal role from its inception has been to protect the vested interests of the large landowners. The large landowners have employed dishonest economists to write papers on the supposed disadvantages of LVT.⁵⁷ One false argument put forward is that the increase of land taxation values would be self-defeating in that the market price of land would fall with the increase of tax rate, ultimately eliminating the base upon which the tax would be levied. Careful mathematical analysis proves the fallacy of this argument. No matter how high the tax rate, there would always be some base upon which to levy tax and public

57 Gaffney Mason and Harrison Fred, *The Corruption of Economics*, (London: Shephard-Walwyn Publishers Ltd 1994).

revenue would increase with increase in tax rates. At no rate could public revenue exceed the full economic rent.⁵⁸

The large landowners are also under the impression that the ranches are going to be abolished and subdivided to settle the landless. This will not be the case. In areas of low agricultural potential smallholding is not economically viable. That land is put to better use by means of large-scale cattle ranching, so the ranches will scarcely be affected.

Then there are other secondary beneficiaries of untaxed land ownership.

The land speculators and tax-loss farmers, since at present it costs them nothing to withhold land from use for years on end.

The commercial banks, since if LVT is implemented and land prices drop, there will be less demand for loans from banks.

The automobile industry, since LVT will lead to more compact cities with efficient mass transit systems which will reduce the demand for cars.

The oil industry and big mining companies, since at present they pay very little in royalties for what they take out of the ground. Many times they make life difficult for the local population, but sometimes the locals hit back as we see now with Shell in Nigeria. Since the State in Kenya already claims any future mineral discoveries, the solution proposed by Silvio Gesell can be applied.⁵⁹

The big supermarket chains, since they can cut out competition by buying strategically placed plots and NOT developing them so that competitors cannot operate from them.

Agribusiness, since the big food corporations are not in that business to provide food but to make profit. LVT will lower the profits of these massive corporations, most of which are also receiving government subsidies. These subsidies are harming African agriculture which cannot compete with the low costs. Witness also the suspicion that the majority of mankind now has that the products of agribusiness

58 Hickock Julian, '*The Significance of Land Value Taxation and Land Speculation – Boom and Bust*', Paper presented at the Henry George School Conference in St. Louis, Missouri, 23 July 1966 [available at www.cooperativeindividualism.org/hickok-julian_on-technical-implementation-of-land-value-taxation.html Consulted June 2008].

59 Silvio Gesell, 'The Natural Economic Order Part 2' in *Free Land*, trans. by Philip Pye, rev by Silvano Borruso. Gesell proposed that the State invites mining companies to tender to work the mines. The lowest tender per ton of output is accepted. The State then sells the output to the highest bidder. The difference is the rent which goes into the public treasury.

may not be so good for their health. LVT will help to bring back the family farm to prominence, leading to greater food security and freedom of choice.

And lastly, some politicians, since many of them enter politics in order to protect their landed interests. Others are regularly elected from their “captive” electorates – poor people who depend on government handouts. With LVT there will be fewer poor people. An electorate which is more economically empowered is less likely to be bought off.

XI. CONCLUSIONS

In conclusion, ownership of land is a figment of the imagination; the reality is that land is only occupied. Since freehold tenure is legally inconsistent with the imposition of Land Tax it would be better to abolish freehold tenure. If that is not possible, LVT can still save the situation. Let those who have freehold tenure continue to imagine that they own the land, but make them pay the occupation tax year after year then justice will be done.

The land problem is not the only one affecting mankind; there is also the monetary problem of the fractional reserve banking system and usury. That too must be solved. Land Value Taxation is not a panacea, but it is an essential component of a holistic solution.

Finally, turning to Kenya; this Parliament has now been in power for almost two years and there is very little progress in social justice to show for it. Nothing essential has changed. Instead of an attempt to solve the problems of the country all we are seeing is a contest for the 2012 elections. The same corrupt wheeling and dealing continues. The land question is still the biggest issue and if the government does not do something positive about it before the next election there will be more strife.

EVIDENCE BASED POLICY: HOW DOES THE DRAFT NATIONAL LAND POLICY MEASURE UP?

Michael Norton-Griffiths¹ Thomas Wolf and Raul Figueroa

ABSTRACT

Empirical data demonstrate serious disconnects between certain provisions in the Draft National Land Policy (DNLP) and the opinions of the body civic. Specifically there is no evidence that pastoral communities will passively accept the confiscation of their property rights and reversion of all pastoral lands back to central government control; there is strong evidence that the 3.8 million holders of agricultural, domestic and commercial title deeds in Kenya will strongly resist the provisions to open all such title deeds to legal challenge and place strict encumbrances on their ability to transfer their titles; and there is strong evidence that the motivation among activists in violence-prone areas is more connected with a lack of jobs and education than with land issues.

In consequence, a number of policy proposals have been submitted to Government which, if adopted, will alienate some 9.2 million pastoralists and some 3.5 million holders of agricultural, domestic and commercial titles.

The main defect in the policy formulation process was to concentrate almost exclusively on minority rights issues, social issues and historical injustices at the expense of economic perspectives. This in turn came about from an over-reliance on the part of the Ministry on a single, umbrella group of NHOs and CSOs, the Kenya Land Alliance, which created a self-selecting group of participants with a restricted and unbalanced agenda. Stakeholders with different and conflicting views were actively excluded from the policy formulation process.

Umbrella groups like the Kenya Land Alliance fail the most basic tests of good governance in that they are neither elected, transparent nor accountable to those whose interests they claim to represent.

Furthermore, by adopting a backward-looking rather than a forward-looking mindset, the DNLP fails to address and incorporate the dynamic and rapidly evolving nature of tenure and land management throughout Kenya, or the problems to be expected in the near future from further population growth.

I. INTRODUCTION

The Draft National Land Policy (DNLP) of May 2007 is an impressive, comprehensive and informative document which has sparked off a wide-ranging debate on land issues that was, perhaps, long overdue.

The DNLP argues from a new and original perspective, specifically that the critical problem facing Kenya's land tenure system is the inequitable distribution of land, rooted in past historical injustices and exacerbated by contemporary illegal or "illegitimate" expropriations. And in seeking to protect the rights of the marginalised, dispossessed and other minority groups the DNLP proposes to reverse the long-standing priority of successive Kenyan Governments to convert traditional, customary tenure regimes into private ownership with security of tenure enshrined in, and protected by, secular law.

The DNLP also proposes major institutional reforms, from a systematic and transparent programme of land registration to a new, massively centralised bureaucracy to manage all aspects of land policy, including the imposition and collection of capital gains and inheritance taxes.

While these are all highly laudable aims, based on the highest of moral principles, the DNLP is clearly deficient and imbalanced in a number of important respects:

- (a) First, the Policy concentrates almost exclusively on the social values of land over its economic values. This has in turn led to major disconnects between a number of provisions in the Policy and what would usually be considered to be normal economic and social realities among the body civic.
- (b) Second, by attempting to redress the (real or perceived) injustices of the few the Policy stands a far greater chance of creating much greater injustices for the many.
- (c) Third, the Policy looks backwards rather than forwards and remains firmly rooted in the stale paradigms of the '50s and '60s. It therefore fails to recognise the current dynamics of land tenure and land use across the country, specifically in response to rapidly changing market conditions¹, and it fails completely to identify and address problems that will arise in the very near future from population growth, which is set to double within 15 years.
- (d) Fourth, in its current form the DNLP is effectively word-for-word the same as the Land Chapter in the "Bomas Draft" of the new Constitution. This draft was roundly rejected in the referendum of November 2005 and the Land Chapter was one of the main reasons for its rejection.

We examine in this paper the processes and procedures leading to the formulation of the DNLP itself to identify any weaknesses, lack of integrity or procedural impropriety.

1 For example, Nairobi alone transfers some \$400m – \$500m a year (at farmgate prices) to the rural hinterland for agricultural goods and services, initiating major modifications in land tenure and creating major opportunities for investment in land management and production.

II. METHODS

There is a complex matrix of land use and land tenure in Kenya (Table 1) each of which will be influenced to some extent by the provisions of the DNLP. We cannot address all of these interactions in one short chapter but will instead concentrate on just one or two to demonstrate and characterise our major concerns.

Specifically, we will try to describe the current economic and social dynamics of a few of these land use/land tenure complexes; analyse the potential impacts on them of provisions in the DNLP; and use our empirical survey data to identify any disconnect between the provisions of the DNLP and existing social and economic conditions.

We have three sets of empirical survey data. First, in July and September 2008, national surveys of public opinion on land issues were conducted within the framework of the quarterly Steadman SPEC Barometer surveys (see steadman.com). Second, field surveys were undertaken in May and June 2008 among the youth in the areas of maximum disruption following the post-election violence. Finally, opinions were sought from pastoral MPs, from Chairmen and members of pastoral County Councils, from researchers active in pastoral areas, and from pastoral communities on certain provisions within the DNLP which may well impact pastoral communities.

III. RANGELANDS

Based on the 1999 population census (CBS 2001), Kenya's vast rangelands of 500,000 km² support a pastoral population of around 6.1 million, some 21% of Kenya's population of 28.7 million². Although hard data are difficult to come by (Norton-Griffiths 1998), some ~70% (350,000 km²) of these rangelands remain as unadjudicated Trust Land, administered by (elected) Local Councils but where the customary and usufruct rights of the Pastoral land-users are protected and enshrined in their traditional, customary laws and practices. On the remaining ~30% (150,000 km²) of the rangelands, large parcels of land have been adjudicated and tenure transferred under the Trust Land Act [Cap. 288] (the "Group Ranch Act") to a designated group of families and individuals.

2 The DNLP also uses the 1999 census as a baseline, but mistakenly quotes a population total of 30.4 million.

But nothing is static, and we observe throughout Kenya's rangelands a production system in the process of rapid evolution and change (Norton-Griffiths and Said 2008, and Figure 1). Specifically, we see growth in the human population, an associated growth in the area under cultivation, stable livestock populations (over the last 35 years) but with increasing growth, and everywhere the rapid elimination of wildlife (~70% loss over the last 30 years). We also see significant gains on a number of economic indicators between adjudicated Group Ranches and unadjudicated land under customary tenure (Burnsilver and Mwangi 2007), including livestock populations and off take, the amount of cultivation³ and wildlife populations and trends (Kabubo-Mariara 2002, Norton-Griffiths et al 2008, Western *et al* 2007).

This whole rangeland production system is in the process of rapid evolution from nomadic, transhumant pastoralism to a more sedentary agro-pastoralism (Norton-Griffiths and Said 2008, Kristjanson et al 2002). The process of change is cascading down the rainfall gradient, and is proceeding faster, and is more advanced, in areas of higher as compared with lower agricultural potential. Already, >50% of the rangelands with agricultural potential now support cultivation. And this evolution is leading to significant economic and social gains.

Unsurprisingly, these changes in production are being accompanied by an equally rapid evolution of property rights (Mwangi 2006). On unadjudicated land under customary tenure there is a move towards adjudicating land to create Group Ranches⁴, while on adjudicated land under Group Tenure there is a trend towards subdivision into individualised parcels of land⁵ under private tenure (Mwangi 2007, Reid et al 2007, Thornton et al 2006).

It is therefore somewhat surprising to find that the Draft National Land Policy contains no provisions to enable or support these processes of change which are so clearly delivering social and economic benefits. Instead, the DNLP completely ignores, and indeed seems completely ignorant of, these dynamics in land use and land tenure, and instead proposes to repeal not only the Land (Group Representatives) Act [Chapter 287] (the "Group Ranch Act")⁶ but also the Trust

3 Today, one hectare of onions grown near the Maasai Mara National Reserve will meet a family's education bills. 25 years ago neither the onions, the market for those onions, nor the transport networks either existed or were even conceived of.

4 In Samburu District alone there are 31 applications before the courts to form Group Ranches (of which 3 have been granted, 20 are in process, and 8 are in abeyance).

5 For example, around the Maasai Mara National Reserve in Kenya, 42 landholdings of ~50,000 ha each have been sub-divided into ~55,000 landholdings of 50ha each.

6 Section 183(b) of the DNLP.

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Land Act⁷ [Chapter 288], thus converting all rangelands into some new form of Trust Land administered no longer by locally elected Councils (however bad they may be) but by politically appointed bureaucrats in central Government.

There seem to be two intentions behind these provisions. First, to prevent pastoral families or communities from entering into ill-advised land deals and even, perhaps, to provide restitution to those who entered into such deals in the past. Second, as a response to the undeniable fact that some Group Ranches have not "worked" and have fallen in thrall to corrupt Group Ranch Committees who perpetually re-elect themselves.

While it is true that some families made very injudicious land deals after the first "round" of sub-divisions (Kimani and Pickard 1998, Rutten 1992), and that some of the initial sub-divisions were very biased in favour of local elites (Homewood et al 2001, 2004, Thompson and Homewood 2002), Group Ranch members are today much more politically and financially astute, reflecting the generally higher level of education and skills throughout pastoral societies and communities. Equally, while it is true there are some really dreadful Group Ranches in terms of management and provision of services to their members, in general Group Ranches have provided social and economic benefits and in many cases are now run as highly profitable business enterprises⁸.

Of course, there is no perfect world and there will always be losers; but to penalise the many (by eradicating Group Ranches and, therefore, preventing new ones from being created) because of the failings of the few is simply not supportable. Far better to ensure in the DNLP that the existing Group Ranch act is applied more comprehensively and that corrupt Group Ranch committees are evicted.

Although we have been unable to make a formal survey of attitudes to these provisions in the DNLP among pastoral communities and families at large, we have sought opinion from pastoral MPs, from chairmen of pastoral County Councils, and from many other groups and individuals active in pastoral affairs, politics and development. In contrast, we can find little evidence of any serious effort on behalf of the Lands Ministry to discuss these issues with pastoral communities, through

⁷ Section 66(b) of the DNLP.

⁸ Mbirikani Group Ranch, in Loitokitok, is a case in point. While in no way perfect, the ranch earns ~\$250,000 a year in tourism revenues, including a predator consolation scheme; new tourism investment has been obtained; each GR member has a ~1 acre agricultural plot in the nearby swamplands for production of irrigated horticulture; and the GR committee has built clinics and schools.

pastoral forums or whatever, or even take the matters up with the appropriate elected MPS and County Councils.

Nonetheless, the National Land Policy Secretariat and the Land Reform Transition Unit both claim to have the "full and unequivocal support of all pastoral communities throughout Kenya" for these provisions.

We simply cannot substantiate this and we can find no convincing evidence that pastoral communities will sit idly by while their property rights are confiscated in this manner. Instead, we are advised that any attempt at such draconian measures would prove to be extremely unpopular, with both the pastoral communities and with the elected County Councils and MPs, and would elicit significant resistance and even hostility among pastoral communities.

Furthermore, we have found significant concern over Section 93 (b) of the DNLP which states that ".....The Government shall compulsorily acquire all land on which natural resources have been discovered before allocating such land to interested investors in order to prevent the exploitation of local communities ...". The spectre looming here is one of a policy deliberately to weaken pastoral property rights and thus enable takings of resource-rich land by political and economic elites.

So there would seem to be a significant disconnect here between the ideas and intentions of those drafting the National Land Policy and the social and economic realities of the pastoral communities.

IV. AGRICULTURAL LANDS

The ~80,000 km² of agricultural lands of Kenya hold some 26m people, ~18m (67%) in the rural areas and the remaining ~8m (33%) in the urban areas. There are three main tenure systems (Table 2); Traditional Customary Tenure, restricted to unadjudicated land, private Freehold (titled) tenure on adjudicated land and Commercial Leasehold Tenure (99 year to 999 year term leases), also on adjudicated land (Norton-Griffiths 2008).

(a) Commercial Leasehold Tenure

~14% of agricultural land is under commercial Leasehold Tenure with 999 year or 99 year leases. Economies of scale on these larger farming units, and access to capital (both domestic and overseas), results in the highest net returns to agricultural and livestock production of \$416 ha⁻¹y⁻¹ found in Kenya (Table 2), contributing 25% of the annual net agricultural and livestock. Population densities

are low and this tenure regime supports only 10% of the rural population. Land under commercial Leasehold Tenure represents the most efficient farming system in Kenya, relying on high capital inputs rather than raw labour, and producing high value outputs for both export and domestic markets.

(b) Private Freehold Tenure

~36% of agricultural land is under private Freehold Tenure. Net returns to agricultural and livestock production of \$347 ha⁻¹ y⁻¹ generate 52% of the annual net agricultural and livestock revenues. Labour is important to this intensive farming system and some 66% of the rural population is found on this land. Land under private Freehold Tenure represents the millions of intensive, smallholder farmers in Kenya. They are a key pillar of the Kenyan economy, and supply high value outputs both to the burgeoning domestic markets and to export markets.

(c) Traditional Customary Tenure

The remaining ~50% of agricultural land is under traditional Customary Tenure. This land produces the lowest net returns to agricultural and livestock production (\$110 ha⁻¹ y⁻¹) and contributes only 23% to the annual net agricultural and livestock revenues. Population density is low and this tenure regime supports only 24% of the rural population. Land under traditional Customary Tenure contributes least to Kenya's agricultural economy yet takes up fully 50% of all agricultural land.

(d) Investment in Sustainable Land Management

We also see that investment in long-term, perennial cash and woody crops is highest on commercial leasehold land (Table 3), while investment in managed woody vegetation and, especially, in hedgerows is highest on land under private, freehold tenure. Customary tenured land performs worst on all these important environmental indicators. Furthermore, investment in soil conservation activities (Figure 2) is clearly higher on land under private freehold tenure (Kabubo-Mariara *et al* 2006, Norton-Griffiths 2008).

Investment in perennial cash and woody crops, woodlots and hedgerows demonstrates a long-term perspective and commitment to land management and sustainable production among these freehold and leasehold farmers. In contrast, such long-term perspectives are lacking under traditional, customary tenure regimes.

(e) Provisions in the Draft National Land Policy

These three tenure regimes are highly dynamic and are continuously responding and adapting to change: to population growth, to off-farm migration, to investment of off-farm income and to new market opportunities, especially the burgeoning domestic markets for agricultural and livestock products driven by urbanisation (Tiffen 2006).

As with tenure and land use on the Rangelands, it would seem logical for the DNLP to recognise the importance of these different tenure systems, their varied contributions in the creation of both wealth and social benefits and the dynamic nature of their interrelationships. Specific provisions might be expected to strengthen the existing system of tenure and property rights and to encourage and enable future opportunities (while acknowledging and avoiding past errors), and especially provisions to encourage the adjudication process to convert land currently under traditional customary tenure to private, freehold tenure.

But instead there are a number of provisions with the potential to dramatically undermine these tenure and use systems, especially commercial leasehold tenure and private freehold tenure. The most radical of these provisions are:

- (a) Section 77(a) repeals the principle of absolute sanctity of first registration under the Registered Land Act.

This removes the security of tenure from millions of domestic, commercial, agricultural and pastoral land owners and land users and opens every land title in Kenya to legal challenge. The intention here is to open fraudulently obtained titles to legal challenge. But, as the Ndungu Report made so clear (GOK 2004), there are other ways of doing this without imposing such collateral damage.

- (a) Sections 68(b) and 77(b) limit the rights of registered, primary title holders to deal freely with, and dispose of, their land (whether freehold or leasehold) as they see fit;

"[The Government will] ... regulate the power of the primary rights holder to dispose of land in order to ensure that such disposal takes into account all the other legitimate rights held or claimed by other persons over the affected land, including family rights. In particular, the law should impose an obligation on the primary rights holder to obtain the written and informed consent of all secondary rights holders before disposing of the land."

The intention behind this provision is to make it more difficult for landowners to sell land out from under their family, or to put family land at risk by using the land as collateral. However, there will be significant collateral damage, for the provision will create chaos in the orderly transfer of titles and in the ability of landowners to

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use land either as collateral for loans or to raise working capital for improvements or new investments.

- (a) Sections 79(a), (c) and (d) revoke all 999 year leases to 99 years or less, and restricts all new leases to 99 years, or less.

This provision seems steeped in the politics of envy and resentment, with significant potential for both economic and environmental collateral damage. In general, shorter term leases are associated with unsustainable, resource mining and lower net returns to land rather than with long term, sustainable use.

All the evidence suggests that the longer the term of a lease the higher are the standards of land management and social management (of the labour force) and the higher is economic productivity. Commercially managed tea, for example, is on an 80-100 year rotation, and associated with these 999 year leases are the highest standards of both land and social management.

In contrast, the 20-year leases of some of the export horticulture schemes are associated with significant environmental problems (soil erosion and pollution – especially of lakes and rivers); while standards of social management are often horrendous. The even shorter term wheat leases in the Mara area, of 10 years or so ago, led to outright resource mining, poor standards of land management, high rates of soil erosion and long-term reduction in yields.

V. EMPIRICAL SURVEY DATA - STEADMAN BAROMETER SURVEYS (JUNE 2008)⁹

Since these provisions will impact every single landowner and leaseholder in Kenya, we initiated a national level survey to find out what landowners and leaseholders actually feel about proposals to generally weaken their property rights.

Question: Do you yourself own or lease land or property?

YES: 38% **NO:** 62%

Question: Do you think the Government should protect your rights to your land and property?

YES: 93% **NO:** 7%

Question: If you want to sell or dispose of your land or property, do you think anyone else should have the right to prevent or stop such a sale or disposal?

⁹ See www.steadman.com for operational details of the Steadman Barometer Surveys.

YES: 28% NO: 72%

Our survey results suggest there are between 3.44 million and 3.59 million holders of title deeds in Kenya, agricultural, domestic and commercial, freehold and leasehold (Annex 1). If we use the average of ~3.51 million title holders, then ~3.3 million (93%) feel that the Government should protect their rights to land and property and ~2.5 million (72%) think they should be able to dispose of their property as they see fit and without let or hindrance from others.

These data also demonstrate a major disconnect between the provisions of the DNLP and the hopes and aspirations of the body civic. Clearly, it is very probable that these provisions to repeal the Land Registration Act and to place encumbrances on the free transfer of titles will meet with significant resistance from the holders of title deeds.

Our second objective was to gauge the extent of problems concerning land alienation, either from using land for collateral or for other reasons.

Question: Are you aware of anyone, whether family member or not, who has lost a piece of land because...

Unaware of anyone losing land	49%	6.0 million ¹⁰
Aware of people losing land	51%	
Causes...		
Ethnic disturbances	24%	2.9 million
Inheritance	14%	1.7 million
Financial (security, loan etc)	11%	1.3 million
Governance (fraud, grabbing)	2%	0.2 million

These data show that 11% of the population is aware of instances where people have lost land through using it as collateral (not that 11% of the population have lost land for this reason). This demonstrates yet another disconnect between the provisions contained within the DNLP and the economic and social realities of the body civic, for these provisions to place encumbrances on the free transfer of title will have a 100 per cent incidence of collateral damage on each and every one of the 3.9 million owners of a title deed in Kenya, a rate of collateral damage far in excess of the prevalence of the problems they are meant to address.

¹⁰ The DNLP uses the 1999 census of 30.4 million people as a population baseline, with 60% < 18 years of age. Steadman survey only the 12.2 people of >18 years of age.

VI. HISTORICAL INJUSTICES AND POST ELECTION VIOLENCE

It is axiomatic that the post-election violence of 2008 was largely symptomatic of festering resentments about historical injustices over varying time periods in the alienation and/or allocation of land. Historical injustices, real or perceived, receive much attention in the DNLP.

We surveyed a total of 1300 "disaffected, male youths" of between 18 and 35 years of age in the areas most affected by post-election violence in Nakuru, Eldoret, Kisumu, Kibera and at the Coast. The results indicate a more complex set of motivations than simple land issues.

Question: What are your greatest aspirations?

To have a job:	36%
To have access to loans:	35%
To have education/scholarships	14%
To have land	12%

Question: What are your most pressing problems?

Lack of jobs	88%
Lack of education	70%
Lack of voice in government and decision making	54%

Lack of Land	32%
Violence and security	13%

Question: In your opinion, is 3 acres of land more important than:-

(a) free education up to the end of secondary school?

YES: 24% NO: 76%

(b) a small business providing 20,000/- a month?

YES: 35% NO: 65%

Analysing these data within a multiple ranking scheme suggests the following:

Jobs: Jobs, local development, access to finance and loans Mean Rank 1.5

Education: education, training, university scholarships Mean Rank 2.5

Governance: A say in local government decisions, youth leadership Mean Rank 3.3

Land: access to land resource Mean Rank 4.3

There is, however, one disturbing detail. If the sample is divided into two cohorts, those who admit to carrying out violent acts (~30%) and those who claimed to be non-violent (~70%), then the one third of violent youths rate land resources to be the most important.

The motivations among the "youth" in these violence-prone areas seems to be quite complex. A minority seems prepared to use violence to obtain land resources, which they value highly, while a more silent majority look to jobs, education and better governance.

VII. ASSESSMENT OF THE POLICY FORMULATION PROCESS

Our data identify major disconnects in at least three critical areas between provisions in the Draft National Land Policy and the social and economic realities among the body civic. Specifically:

- (a) There is no evidence of any support among pastoral communities for the provisions to confiscate their property rights and revert all pastoral lands to centralised control from Nairobi;
- (b) There is strong evidence that the ~3.9 million holders of agricultural, domestic and commercial title deeds in Kenya, freehold or leasehold, will strongly resist the provisions to open all such title deeds to legal challenge and place strict encumbrances on their ability to transfer title.
- (c) There is strong evidence that the motivation among youths in violence-prone areas is more connected with a lack of jobs and education than land issues.

Yet both the National Land Policy Secretariat and the Land Reform Transition Unit claim all-inclusive popular support for these provisions and interventions, and indeed for the entire Policy. There are three foundations to these claims of support and legitimacy:

- (a) From the all-inclusive process of holding regional seminars across the country and national seminars in Nairobi, at which all stakeholders and interest groups had an opportunity to present their points of view;
- (b) From the strong endorsements of professional organisations; and
- (c) From strong support and finance from a wide range of donors and NGOs.

We analyse here the basis of these claims of legitimacy from the Ministry of Lands and Housing, the processes that lay behind the policy formulation process and whether there was any procedural impropriety.

(a) The All-Inclusive Consultation Process

The National Land Policy Secretariat in the Ministry of Lands and Housing was responsible for developing the Draft National Land Policy, working through six thematic groups and numerous sub-groups. The groups were (technically) open to wide participation by government agencies, NGOs and CSOs, with the Kenya Land Alliance (KLA) playing a prominent role. Prominent by their absence were representatives from the private sector.

In the course of 2005–2006, fourteen Regional Consultations were held around the country. Their results were subject to "extensive commentary from stakeholders and considerable publicity and broad public consultation". A final draft of the DNLP received "unanimous approval" at a stakeholder symposium in Nairobi in April 2007 despite the expression of significant reservations by a number of parties including the Kenya Landowners Association (KELA) and the Law Society of Kenya (LSK). The DNLP was later approved by the Ministry of Lands in May 2007.

Many other meetings and discussions were held, either by the Ministry or by stakeholders' groups, including:

- (a) Kenya Landowners Association seminar, 12 June 2007, to advise private sector groups on the potential collateral damage from the DNLP;
- (b) Institution of Surveyors of Kenya, 12 March 2008, providing unequivocal support for the provisions of the DNLP;
- (c) The USAID/LTER workshops, 6 March, and 27–28 March 2008, to identify possible entry points for USAID into the policy implementation process;
- (d) The Focused Stakeholders Workshop on the Draft National Land Policy, Safari Park Hotel, Nairobi, 5–6 June 2008, to discuss concerns and reservations from Private Sector associations; and
- (e) Extensive publicity campaigns by the Ministry, especially in response to concerns and reservations expressed by professional organisations.

The Ministry is clearly of the opinion that it has opened the policy formulation process as widely as possible to all stakeholders, that it has publicised the process widely both to the body politic and to the body civic, and that it has run a genuinely participatory process. However, our data from the Steadman Barometer Survey suggests penetration of the DNLP into the body civic is modest, to say the least, in that 87% remains unaware of the DNLP.

Question: Are you aware of any Government efforts currently, or over the last few years, to address land issues?

NO: 56%

YES: 44%

Which ones?

Resettlement of IDPs following ethnic disturbances 13%

National Land Policy 13%

Distribution of title deeds to squatters 11%

Removing settlers from forest areas (e.g. Mau) 7%

One of the key movers and shakers in the policy formulation process was the Kenya Land Alliance (KLA), an umbrella group of local, civil society NGOs. Their central organising role is clear from their website¹¹ where they assert almost equal status with the Ministry itself. For example:

".... The forum [April 2007] was in agreement that the Draft National Land Policy that was in April disseminated jointly by the Ministry of Lands and the Kenya Land Alliance adequately catered for the interests of all Kenyans with regard to ownership of land."

It is clear from their website that the KLA were marshalling the forces of civil society with the full backing of the Ministry. Specifically they:

- (a) Organised cooperation between NGOs and CSOs;
- (b) Held five Regional Workshops at Kisumu, Nanyuki, Mombasa, Nairobi and Nakuru;
- (c) Forwarded recommendations on the DNLP to the National Land Policy Secretariat in the Ministry;
- (d) Formulated a Civil Society Position Paper at a Civil Society Forum in Nairobi with over 400 participants; and
- (e) Developed 5 Policy Briefs on a range of issues including historical injustices, land management and administration, community and minority rights issues.

11 www.kenyalandalliance.or.ke.

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Finally, their web site urges all those NGOs and CSOs participating in the policy formulation process to "... remain vigilant to ensure key provisions in the document are not watered down."

Clearly, the Kenya Land Alliance had been well funded and counted on the full support of the Ministry. This in itself is no bad thing and the KLA can be viewed as just another very successful, local lobby group. But the danger is that by focusing on one set of issues at the expense of others, and giving preference to one set of participants (primarily Civil Society groups) at the expense of others (specifically, groups representing the private sector and private landowners) the entire process becomes distorted and unbalanced and the full spectrum of inputs and opinions becomes restricted. Inevitably, this generates a self-selecting group with restricted and imbalanced views.

We feel this is the key component underlying the observed disconnects between provisions in the Draft National Land Policy and the economic and social realities found within the body civic. Clearly, land can be considered from two different, but not necessarily incompatible, viewpoints: as an economic asset and a factor of production, or as a social and community asset. But both views must be incorporated into a policy, and if one prevails at the expense of the other, as we argue is the case with the DNLP, then the resulting policy will be unbalanced and distorting.

Of further and more general concern is the gradually increasing influence over the last few years of NGOs and CSOs in driving the policy formulation process in Kenya, especially those set up and funded by overseas NGO/CSO groups with strongly held agendas. However well meaning and altruistic these groups may appear to be, they are neither elected by the body civic, nor do they truly represent the body civic nor are they accountable in any meaningful way to the body civic.

On all counts, these NGOs and CSOs fail the acid test of good governance. Given that these NGO/CSO groups are neither elected, transparent nor accountable, why should they shape Kenyan policy rather than Kenya's own elected parliamentarians¹²?

12 An exactly similar process was seen with the Wildlife Policy Review and Formulation Process in 2006/07 which was completely high-jacked by a well funded, overseas animal welfare NGO (in this case IFAW – the International Fund for Animal Welfare) working through locally created and funded NGOs (Norton-Griffiths 2007a, 2007b). The result was a Wildlife Policy and Wildlife Act pandering solely to the objectives of the international, animal welfare lobby rather than addressing the very real problems facing wildlife conservation in Kenya today.

As Deepak Lal (Lal 2006) so admirably puts it:

"Foreign NGOs claim to speak on behalf of the "world's poor" but in fact speak the language of the "world's rich" and invariably seek their own agendas and purpose rather than those whom they purport to help. Through their financial strength and access to political elites, especially in poor countries, they are able to subvert the representative democratic process and insinuate foreign minority views into what are supposedly parliamentary majority voting systems."

(b) Endorsements from Professional Associations

The National Land Policy Secretariat in the Ministry of Lands and Housing claims significant legitimacy from the apparent strong support and endorsement of the DNLP from a number of Kenyan professional organisations (Table 4). However, on closer inspection it emerges that in almost all cases the individuals claiming to speak "on behalf of" these associations were in fact speaking in their own personal capacity.

The Kenya Private Sector Alliance, the Law Society of Kenya and the Kenya Bankers Association, among others, all of them important contact and lobby groups with the Government of Kenya, were outraged when informed (by the Kenya Landowners Association) that their associations had apparently "endorsed" the Draft National Land Policy. All are now re-evaluating their position and are preparing fresh representations to the Ministry.

Certainly, few if any of these associations had formerly discussed the DNLP with their membership nor had they formally polled their opinions. A number of these associations are now doing this, and previous endorsements may well be withdrawn. Even the Institute of Surveyors of Kenya may break ranks. Though their Chairman is genuinely committed to the DNLP, and provides strong public endorsement on behalf of his association, there is now firm evidence¹³ of significant dissatisfaction within the membership where support for the DNLP is lukewarm, to say the least.

Clearly, if endorsements are to be sought from Professional Associations in support of a policy formulation process, it is important for all parties to ensure that the endorsement is based on a genuine and transparent evaluation by the Association of both the policy itself and of the opinions of their members.

¹³ Personal communications from individual members. Give approximate date of communication I have contacted the person concerned who wishes his name to be omitted. The Chairman of ISK has let it be known that any individual openly breaking ranks could be ejected from the ISK, in which case they would not be able to practice.

(c) Support from the Donor Community

The National Land Policy Secretariat in the Ministry of Lands and Housing has received significant and consistent support from the donor community over the four years or so that it has taken to draft the policy. This support was reiterated at a donor panel on 28 March 2008, hosted by USAID and attended by representatives of UN Habitat, Swedish SIDA, Danish DANIDA, the World Bank and DFID of the United Kingdom.

The position of the donors is very straightforward: they claim to be simply "enabling" the policy formulation process with financial and logistical support, all as part of agreed bilateral or multilateral support for the Government of Kenya. What Kenya actually does with the funds and logistical support is up to them, and they (the donors) have no input at all into the Policy itself, just to the formulation process.

In this the donors are disingenuous in two respects. First, when donors literally boast of their support and sponsorship for a policy formulation process, and when this process goes so disastrously wrong as this one clearly has, then errors of commission and omission on their behalf are near certain, despite protestations to the contrary. Second, as the groundswell of opinion challenging a number of provisions in the DNLP developed and became formalised, first through the somewhat unlikely vehicle of the Machakos and Makeni Ranchers' Association (MacMak)¹⁴ and only later through the Kenya Landowners Association (KELA)¹⁵, the response of the donor community, especially DFID and UN Habitat, was at first dismissive but rapidly became actively hostile, to the extent of denying representation from the Kenya Landowners Association at key meetings and seminars and actively lobbying against KELA within the body politic.

Despite their protestations to the contrary, the donor community¹⁶ was in fact highly biased and partisan against any meaningful involvement in the policy formulation process by private sector interests in favour of minority rights interests represented by, for example, the Kenya Land Alliance who received substantial funding from them. The fact that the economic and social wellbeing of literally

14 A membership association of some ~120 small, medium and large scale ranchers, MacMak presented a detailed critique of the DNLP to the National Land Policy Secretariat in the Ministry of Lands and Housing in January 2007 (available on mng5.com).

15 An umbrella group of mainly small, medium and large-scale agricultural and livestock producers, representing the interests of pastoral, agricultural, domestic and commercial landowners and users.

16 With the exception of the USAID.

millions of pastoral and agricultural producers was being put at risk by provisions in the DNLP was of the deepest irrelevance and inconsequence to them.

VIII. CONCLUSIONS

Our empirical data demonstrate serious disconnects between the provisions of the Draft National Land Policy, on the one hand, and the hopes and aspirations of the body civic, on the other. It is our contention that the policy formulation process for the DNLP has been deficient in a number of respects, that it lacks integrity and is riddled with procedural improprieties.

By concentrating primarily on minority rights, social issues and historical injustices, an imbalance has been created in the provisions of the DNLP, especially with regard to the rights and expectations of private leaseholders and freeholders in agricultural lands, and customary, group and private land users in pastoral areas.

Although a fully consultative process seemed to have been put in place by the Ministry, the over-reliance on a single, umbrella NGO/CSO group, the Kenya Land Alliance, created a self-selecting group with a restricted and unbalanced agenda, which actively excluded the participation of stakeholders with different and conflicting views. Umbrella groups like the Kenya Land Alliance fail the most basic tests of good governance in that they are neither elected, transparent nor accountable to those whose interests they claim to represent.

The consequence of these failings is that policy proposals have been submitted to Government which, if adopted, will alienate some 9.2 million pastoralists and some 3.5 million holders of freehold and leasehold agricultural, domestic and commercial titles. Ministers and MPs are unlikely to adopt policies with such potentially damaging political fallout.

Furthermore, by adopting a backward-looking rather than a forward-looking mindset, the DNLP fails to address and incorporate the dynamic and rapidly evolving nature of tenure and land management throughout Kenya, or the problems to be expected in the near future from further population growth.

A major consequence of many of the provisions in the DNLP will be to seriously weaken the property rights of all landowners and land users, whether pastoral, agricultural, commercial or domestic, and concentrate the management and control of land within central government. Perversely, the DNLP will be creating the very conditions under which political and economic elites find it easiest to alienate and appropriate land (i.e. steal it) from their rightful owners and users.

Seen from this perspective¹⁷, the Draft National Land Policy is for most of its ideological and intellectual sponsors within Kenya a kind of trojan horse that could, if implemented, be used to undercut the existing establishment and subvert many of the mechanisms by which this elite has been able to gather and maintain wealth and political influence over the last 40 years. Clearly, the DNLP is less about land *per se* than about revolutionising strategic parts of the government machinery for allocating and governing land and renewable resources, thus creating the foundation for a new political and economic order.

ANNEX 1: HOW MANY LAND TITLES ARE THERE IN KENYA?

With the near collapse of the national and district land offices, data on the numbers of titles in Kenya are hard to come by so indirect methods must be used. The basis of our calculations are the survey results from the Steadman Barometer Survey in July 2008 Table A1.

Table A1		
Estimates of the Number of Titles (Freehold and Leasehold) in Kenya		
Item	1999 ⁽¹⁾	2004 ⁽²⁾ projection
(a) Population Census ⁽³⁾	28.70	32.80
(b) Pastoral Population	6.10	9.20
(c) Sub-Total - 1 = (a) - (b)	22.60	23.60
(d) % over 18 years of age	40%	40%
(e) Sub-Total - 2 = (c) * (d)	9.04	9.44
(f) % with titles ⁽⁴⁾	38%	38%
(g) Total titles = (e) * (f)	3.44	3.59
Notes: (1) CBS (2001), (2) CBS (2005), (3) all numbers in millions, (4) Steadman Barometer Survey, this study		

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These perspectives arose in the course of recent discussions with Katherine Boone, Professor of Government at the University of Texas, Austin.

The DNLP uses the 1999 census as a population baseline but mistakenly quotes a population total of 30.4 million rather than the correct figure of 28.7 million, of which 60% is under the age of 18 years (CBS 2001). The Steadman Barometer Survey (SBS) does not sample the pastoral population and samples only people over the age of 18 years. In Table A1, the total number of people in the population actually sampled by the SBS is given by Item (e). This is found by subtracting the pastoral population (Item b) from the total population in Kenya (Item a) and multiplying this sub-total (Item c) by the proportion of the population over 18 years of age (Item d). Using the 1999 population baseline gives an estimate of 3.44 million land titles in Kenya.

However, the population will have been significantly greater in July of 2008 when the SBS was carried out. The nearest we can get to this is to use population projections for 2004 made by the National Bureau of Statistics (CBS 2005). This estimates the 2004 population in Kenya to be 35.2 million and the pastoral population to be 9.2 million, giving an estimate of 3.59 million land titles in Kenya.

Accordingly, we will use the average of these two estimates, 3.51 million, for the number of land titles in Kenya.

TABLES AND FIGURES

Table 1				
Land use/land tenure matrix in Kenya				
Status	Unadjudicated Land	Adjudicated Land		
Tenure	Traditional and Customary	Group or Multiple	Private (individual)	Leasehold
Pastoral	Trust lands	Group Ranches	Private livestock ranches or farms (large or small scale)	Large scale commercial ranches
Agricultural	Traditional smallholder farms	Large scale company farms	Private farms (large or smallholder)	Large scale commercial farms
Urban	Squatters in slums	Company owned or private domestic/commercial properties		Primarily commercial properties

Table 2			
Economic characteristics of the three main tenure regimes in agricultural land			
Tenure	Customary	Private Freehold	Commercial Leasehold
% agricultural land	50%	36%	14%
Net returns to land (\$ ha ⁻¹ y ⁻¹)	\$110	\$347	\$416
% net agricultural production	23%	52%	25%
% rural population	24%	66%	10%

Table 3			
Investment in sustainable, long term land management			
Tenure	Customary	Private Freehold	Commercial Leasehold
Investment in ...			
Perennial cash and woody crops (ha km ⁻²)	2.33	12.90	26.90
Managed woody vegetation (ha km ⁻²)	3.07	12.72	9.84
Hedgerows (km km ⁻²)	5.21	23.55	3.54

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Table 4	
Professional Associations and the Draft National Land Policy	
A: Those Claimed by the National Land Policy Secretariat to Provide Full Support and Endorsement	
Kenya Private Sector Alliance	With the possible exception of the ISK, it has emerged that individuals claiming to speak "on behalf of" a specific Professional Association or "on behalf of" a specific community were, in fact, speaking in their own, private capacity. All these associations are currently re-evaluating these "unofficial" endorsements.
Law Society of Kenya	
Kenya Federation of Agricultural Producers	
Kenya Bankers Association	
Institute of Surveyors of Kenya	
"All" pastoral communities in Kenya	
B: Professional Associations who have made written and verbal representations to the Ministry	
Kenya Landowners Association	These associations have significant concerns and reservations with the DNLP and have made written and verbal representations to the Ministry.
Machakos and Makueni Ranchers Association	
Kenya Livestock Producers Association	
C: Professional Associations who are formulating their official position	
Kenya Flower Council	These associations have significant concerns and reservations about the DNLP and are formulating their presentations to the Ministry.
Kenya Tea Development Authority	
Kenya Cereal Growers Association	
Kenya Coffee Growers Association	

Figure 1: System changes on Kenya's rangelands, 1970s – 1990s: % pa change in (A) wildlife numbers, (B) livestock numbers, (C) human population, (D) livestock off take (live sales) and (E) hectares under cultivation

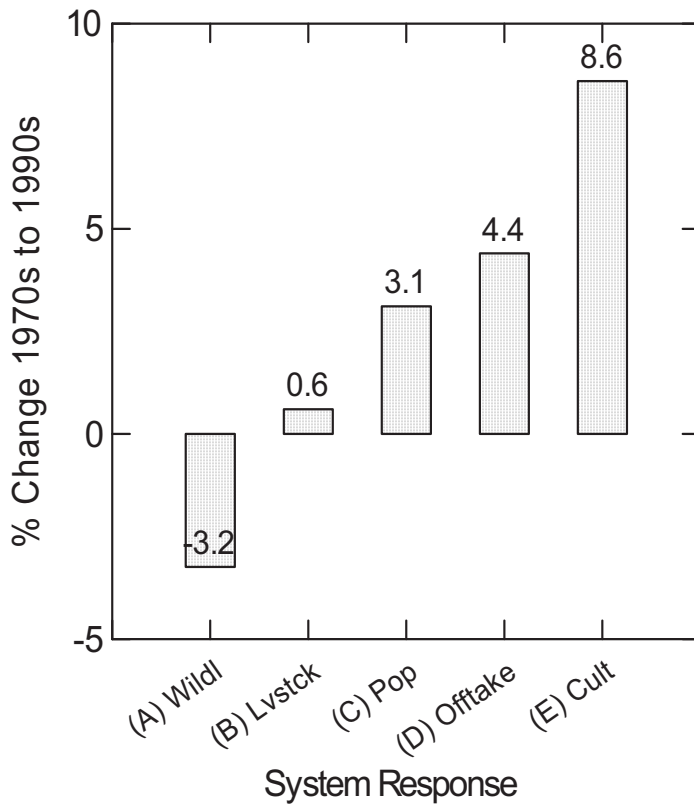
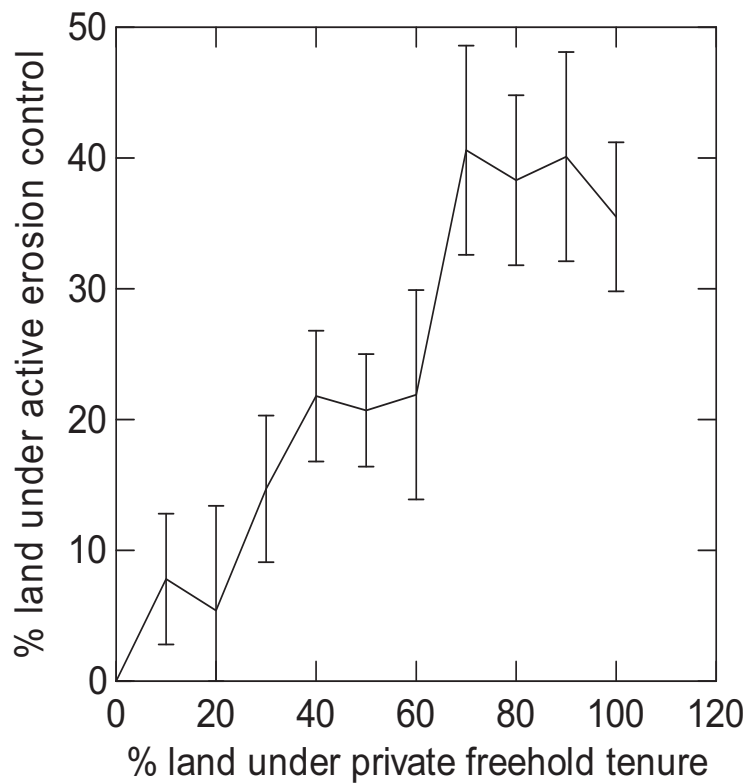


Figure 2: Machakos District, Kenya: Investment in soil conservation (terracing, bunds, contour ploughing, tied ridging) as a function of land tenure (data from 37 locations).



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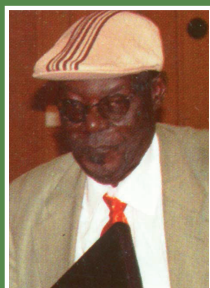
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Governance, Institutions and the Human Condition



TO THE MEMORY of Prof H. W. O. Okoth-Ogendo, a great teacher and scholar. He chaired the session on Land during the Fifth Annual Ethics Conference. He died on 24 April 2009, while this book was being printed.

Strathmore University organised the Fifth Annual Ethics Conference on Governance, Institutions and the Human Condition. Research papers were presented in four sessions, corresponding to four key milestones in the crisis that almost tore Kenya apart in January - February 2008: Constitutional law, Institutions, Education and the

Land Issue. This book compiles the papers presented at the Conference by outstanding scholars and renowned personalities.

In Africa the constitution has been regarded primarily as the means for creating structures and powers of the state, and the limitations on them. It seldom represents continuity in the development of public power. The colonial constitution replaced traditional sources of authority by alien rule. The independence constitution replaced the colonial with democratic indigenous rule. None of them had much connection with the reality of where power was located or the manner in which it was exercised, any more than the institutions of accountability had connection to the dynamics of society.

Yash Pal Ghai

The innumerable mega-corruption scandals, violence, school unrest, tribalism and ethnicity are all linked to a defective education system driven by a utilitarian philosophy that emphasizes consumerism, self-centeredness and "diploma disease" - a condition characterized by desire to have as many academic certificates as possible with the misplaced belief that the more you have the more well-off you shall be.

Justus Mbae

The frequent land clashes and the inability of some displaced persons to repossess their land after land clashes is a clarion call to Kenyans to deal with the land question before it becomes unmanageable. Dealing with this question is not as much a matter of doing what is legal as of doing the right thing in the circumstances. Legality must be tempered with ethics, equity and fairness.

Patricia Kameri-Mbote

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